

United States
Circuit Court of Appeals
For the Ninth Circuit.

PARMER A. GILLESPIE, executor of the
estate of Maud Gillespie, deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the
United States Board of Tax Appeals.

FILED

OCT - 1 1941

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

HAROLD E. RORSCHACH.

For Commissioner:

STANLEY B. ANDERSON,

E. M. WOOLF, Esq.

Docket No. 98770

MAUD GILLESPIE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1939

May 25—Petition received and filed. Taxpayer notified. (Fee paid).

May 25—Copy of petition served on General Counsel.

May 25—Request for hearing in Tulsa, Okla., filed by taxpayer. 5/25/39 copy served.

July 5—Answer filed by General Counsel.

July 10—Notice issued placing proceeding on Tulsa, Okla., Calendar. Copy of answer served.

Dec. 4—Motion for leave to file amended petition, amended petition lodged, filed by taxpayer. 12/5/39 granted.

Dec. 6—Copy of motion and amended petition served on General Counsel.

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- Jan. 3—Answer to amended petition filed by General Counsel.
- Jan. 8—Copy of answer to amended petition served on taxpayer.
- Feb. 17—Hearing set May 13, 1940, Oklahoma City, Okla.
- Mar. 19—Application for order to take depositions of Maud Gillespie, filed by taxpayer.
- Mar. 27—Order to take depositions of Maud Gillespie, entered.
- Apr. 11—Motion to amend order to take depositions to permit the taking of the deposition of Chas. D. Green in addition to Maud Gillespie filed by taxpayer.
- Apr. 15—Order that the order to take depositions issued 3/27/40 be amended to provide for the taking of deposition of Maud Gillespie on April 27, 1940 instead of April 26, 1940, entered.
- Apr. 15—Order to take depositions of Chas. D. Green, entered.
- May 1—Depositions of Chas. D. Green and Maud Gillespie filed (1). Notary served parties.
- May 16—Hearing had before Mr. Hill on the merits. Submitted. Depositions of Chas. D. Green and Maud Gillespie received. Entry of appearance of Harold E. Rorschach, Esq., motion to file amendment to petition granted. Stipulation Facts—Motion to file amendment to petition and amendment to

petition filed at hearing. Briefs due 45 days simultaneously. Reply brief due 15 days. [1*]

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June 4—Transcript of hearing 5/16/40 filed.

June 28—Answer to amendment to amended petition filed by General Counsel. 6/29/40 copy served.

June 29—Brief filed by taxpayer. 7/1/40 copy served on General Counsel.

July 1—Brief filed by General Counsel.

July 15—Reply brief filed by taxpayer.

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Jan. 22—Findings of fact and opinion rendered, Hill, Div. 2. Decision will be entered under Rule 50.

Feb. 19—Computation of deficiency filed by General Counsel.

Feb. 19—Motion for reconsideration filed by taxpayer. 3/19/41 Denied.

Feb. 19—Brief in support of motion for reconsideration filed by taxpayer.

Feb. 24—Hearing set March 19, 1941 on settlement.

Mar. 3—Motion for entry of decision under Rule 50 filed by taxpayer. 3/4/41 copy served on General Counsel.

Mar. 19—Hearing had before Mr. Arundell on settlement under Rule 50. Petitioner agrees to respondent's recomputation. Referred to Mr. Hill for decision.

*Page numbering appearing at top of page of original certified Transcript of Record.

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Mar. 20—Decision entered, Sam B. Hill, Div. 2.

June 19—Petition for review by United States Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

June 19—Proof of service filed by taxpayer.

June 25—Affidavit of service of petition for review filed.

July 14—Designation of contents of record filed by taxpayer—with proof of service thereon.

[2]

United States Board of Tax Appeals

No. 98770

MAUD GILLESPIE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IT:R:E:2, OMS-90D, dated March 2, 1939, and as a basis of her proceeding, alleges as follows:

1. The address of the petitioner is 712 North Roxbury Drive, Beverly Hills, California.

2. The notice of deficiency, a copy of which is hereto attached, marked Exhibit "A", was mailed to the petitioner on March 2, 1939, by registered mail. [3]

3. The tax in controversy is income tax for the calendar year 1935. The deficiency asserted in the ninety-day letter is \$1,476.55, which is the amount in controversy.

4. The determination of the tax as set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in including in taxpayer's gross income the sum of \$17,666.25 received from F. A. Gillespie & Sons Company during the year 1935.

(b) In the alternative, if the Honorable Board determines that any part of the sum of \$17,666.25 received by Maud Gillespie from F. A. Gillespie & Sons Company during the year 1935 is taxable, then only such portion of \$17,666.25 is taxable as represents 3% of what an annuity would have cost at May 15, 1929 as would have produced the sum of \$15,000 per annum during the lifetime of Maud Gillespie.

5. The facts upon which the petitioner relies in support of the foregoing assignments of error, and as a basis of this proceeding, are as follows:

(a) On the 9th day of February, 1921, a certain trust agreement was entered into by which F. A. Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie entered into a

certain Declaration of Trust. A true copy of said Declaration of Trust is attached hereto, marked Exhibit "B". [4]

On the 15th day of May, 1929, F. A. Gillespie and Maud Gillespie entered into a certain agreement, copy of which is attached hereto and marked Exhibit "C".

On the 15th day of May, 1929, a certain Agreement was entered into between F. A. Gillespie, Maud Gillespie and F. A. Gillespie & Sons Company, a copy of which agreement is attached hereto marked Exhibit "D".

Pursuant to the terms of the foregoing agreement, F. A. Gillespie and Maud Gillespie delivered to F. A. Gillespie & Sons Company property having a value materially in excess of the cost of purchasing an annuity upon the life of F. A. Gillespie which would pay him the sum of \$15,000 per year and an annuity upon the life of Maud Gillespie which would pay her the sum of \$15,000 per year or \$25,000 per year for life.

Pursuant to the terms of the foregoing agreement, F. A. Gillespie & Sons Company paid over to Maud Gillespie during the year 1935 the sum of \$17,666.25.

(b) Maud Gillespie, nee Maud McCoy was born in Oil City, Pennsylvania on June 9, 1872. She received the sum of \$17,666.25 during the year 1935 from F. A. Gillespie & Sons Company under and by virtue of the contracts entered into and attached hereto marked Exhibits "B", "C", and "D". An

annuity could have been purchased on May 15, 1929 upon the life of a female individual born on June 9, 1872, which would have paid \$15,000 per annum to said female individual for life for the sum of \$196,537.50. An annuity could have been purchased on [5] May 15, 1929 upon the life of a female individual born on June 9, 1872, which would have paid \$20,000 per annum to said female individual for life for the sum of \$262,550.00. An annuity could have been purchased on May 15, 1929 upon the life of a female individual born on June 9, 1872 which would have paid \$25,000 per annum to said female individual for life for the sum of \$327,562.50.

F. A. or Frank A. Gillespie was born in Venango City, Pennsylvania on April 22, 1868. An annuity could have been purchased on May 15, 1929 upon the life of a male individual born on April 22, 1868 which would have paid the sum of \$15,000 per annum to said male individual for life for the sum of \$153,750.00.

Wherefore, Petitioner prays that the Board may hear this proceeding and determine that there is no deficiency.

(Signed) HAROLD E. RORSCHACH,
Counsel for Petitioner,
529 McBirney Building,
Tulsa, Oklahoma. [6]

State of California,
County of Los Angeles—ss.

Maud Gillespie, of lawful age, being first duly sworn upon oath, deposes and says that she is the

taxpayer named in the foregoing petition and that she has read said petition and is familiar with the statements therein contained and that the facts therein stated are true, except such facts as are stated to be upon information and belief and those facts she believes to be true.

(Signed) MAUD GILLESPIE

Subscribed and sworn to before me this 11th day of May, 1939.

[Seal] (Signed) HELEN GILBERT,
Notary Public.

My commission expires: Jan. 20, 1943. [7]

EXHIBIT "A"

1467M

SN-IT-1

Treasury Department
Washington

March 2, 1939

Office of
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
And Refer to

Mrs. Maud Gillespie,
712 North Roxbury Drive,
Beverly Hills, California.

Madam:

You are advised that the determination of your income tax liability for the taxable year(s) ended

December 31, 1935, discloses a deficiency of \$1,476.55, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetyeth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By JOHN R. KIRK, (Signed)

Deputy Commissioner.

Enclosures:

Statement

Form of Waiver [8]

STATEMENT

IT:R:E:2

OMS-90D

Mrs. Maud Gillespie,
712 North Roxbury Drive,
Beverly Hills, California.

Tax Liability for Taxable Year Ended
December 31, 1935

Income Tax

Liability—\$1,476.55

Assessed—None

Deficiency—\$1,476.55

This determination of your income tax liability
has been made upon the basis of information on
file in this office.

Adjustment to Net Income

Net income as disclosed by return.....(\$ 209.29)

Unallowable deduction and
additional income:

Annuities 17,666.25

Net income adjusted..... \$17,456.96

Explanation of Adjustment

In accordance with the decision of the United States Board of Tax Appeals in the case of F. A. Gillespie for the year 1934 (38 B. T. A. 6 73) the annuity of \$17,666.25, received from F. A. Gillespie and Sons Company, Tulsa, Oklahoma, is taxable to you under the provisions of section 22(b)(2) of the Revenue Act of 1934.

Computation of Tax

Net income adjusted.....	\$17,456.96
Less:	
Personal exemption	1,000.00
	<hr/>
Income subject to surtax.....	\$16,456.96
Less:	
Earned income credit.....	300.00
	<hr/>
Net income subject to normal tax.....	\$16,156.96
	[9]
Normal tax at 4% on \$16,156.96.....	\$ 646.28
Surtax on \$16,456.96.....	830.27
	<hr/>
Total tax liability.....	\$ 1,476.55
Income tax assessed, account #661661.....	None
	<hr/>
Deficiency of income tax.....	\$ 1,476.55
	[10]

EXHIBIT "B"

DECLARATION OF TRUST

Know All Men by These Presents:

That, Whereas, on the 24th day of April, A. D., 1920, there was duly organized and created the F. A. Gillespie and Sons Company, a corporation, duly organized, created and existing under and by virtue of the laws of the State of Oklahoma, with a Capital Stock of One Million Dollars (\$1,000,000.00) divided into Ten Thousand (10,000) shares, of the par value of One Hundred Dollars (\$100) each; and,

Whereas, several years prior thereto the undersigned Settlor, Donor and Trustee, F. A. Gillespie,

had agreed to, and did, convey and transfer the equitable title to certain interests, respectively, in and to a part of the properties later conveyed by said F. A. Gillespie to said corporation, to be paid for as provided, to Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie, the wife and sons of said Settlor, Donor and Trustee, F. A. Gillespie; and,

Whereas, said F. A. Gillespie and Sons Company has issued to said F. A. Gillespie, in his own name, and standing in his individual name, Nine Thousand, Nine Hundred and Eighty (9,980) of said Capital Stock of said F. A. Gillespie and [11] Sons Company, and Five (5) Shares thereof to Maud Gillespie, Five (5) Shares thereof to B. A. Gillespie, Five (5) Shares thereof to L. A. Gillespie, Trustee for said P. A. Gillespie, and said Capital Stock of and in said Corporation is now so held; and,

Whereas, it is the desire of the undersigned Settlor, Donor and Trustee to recognize and maintain the interests, respectively, equitably belonging to said Maud Gillespie, B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie, to be paid for as originally arranged, when so conveying and arranging said equitable titles, and to hold said Shares of Capital Stock, as hereinafter set forth, under the terms, conditions and provisions of the Trust Estate, or Trust, hereinafter set forth;

Now, Therefore, By These Presents, I do hereby declare that I stand seized and possessed of, and

have and hold, Nine Thousand Nine Hundred and Seventy-five (9,975) Shares of the Capital Stock of the said F. A. Gillespie and Sons Company, a corporation, organized, created and existing under and by virtue of the laws of the State of Oklahoma, aforesaid, in trust, having and holding One Thousand, Nine Hundred and Ninety-Five (1,995) thereof as Trustee, and in Trust, for said Maud Gillespie, One Thousand, Nine Hundred [12] and Ninety-Five (1,995) thereof as trustee and in trust, for said B. A. Gillespie; One Thousand Nine Hundred and Ninety-Five thereof as Trustee, and for said L. A. Gillespie; One Thousand Nine Hundred Ninety-Five (1,995) thereof as Trustee and in trust for said P. A. Gillespie, and One Thousand Nine Hundred and Ninety-Five (1,995) thereof as Trustee, and in trust, for said F. A. Gillespie, for the duration and under and upon the terms, conditions and provisions hereinafter set forth, as follows, to-wit:

1. Said shares of said Capital Stock shall, and will be held by said F. A. Gillespie, and his successor or successors, as such Trustee or Trustees, during the life-time of said Maud Gillespie. B. A. Gillespie, L. A. Gillespie, and each of said beneficiaries shall at all times be entitled to all the dividends, for the natural life of each of them, respectively, cash, stock, bonds, or otherwise, accruing and divided and paid, on and from the respective number of shares so held in trust for each of them, respectively, and each shall have a like interest in the surplus, accretions and properties secured by, and

added to said corporation, during the lifetime of each of them, respectively, and during the continuance of this Trust, and Trust Estate. [13]

2. Said F. A. Gillespie shall be and act as such Trustee during his lifetime, and, upon his death, said Maud Gillespie, B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie, or such of them as shall be then surviving, at the time of the death of said F. A. Gillespie, shall succeed said F. A. Gillespie, and shall thereafter act and be such Trustee or Trustees, and, upon the death of any of such Trustees, respectively, the survivor or survivors thereof shall be and act as such Trustees or Trustee.

3. Said F. A. Gillespie, during his lifetime, as such Trustee, shall have the absolute control of said Stock of said beneficiaries, so held by him in trust, and he may allow the same to stand on the books of said Company in his individual name, or may have the same transferred to him, as Trustee, as he shall decide and determine, but in either event, during his lifetime, he shall have the absolute power to vote such stock, as he shall deem fit and proper, and shall not, in any way, be controlled by the beneficiaries in voting the same.

4. In the event that said beneficiaries Maud Gillespie or F. A. Gillespie, or both, should die, leaving the other beneficiaries, or a part thereof, surviving them, or either of them, then the surviving beneficiaries hereunder shall have and take the share or shares of said beneficiary or beneficiaries, share and share alike, each surviving beneficiary [14] or bene-

ficiaries receiving an equal and like part, and said stock of said beneficiary or beneficiaries shall then and there become and be, and remain, a part of this Trust Estate, or Trust, and shall be further administered, under the terms hereof, for and during the lifetime of such surviving beneficiaries, as herein provided for.

In the event that said beneficiaries B. A. Gillespie, L. A. Gillespie and P. A. Gillespie, or either, or all of them should die, before the termination of this Trust Estate, or Trust, with children or issue of their own bodies, respectively surviving them, respectively, then such children or issue shall have and take, share and share alike, under the terms of this Trust Estate or Trust, the shares of said Capital Stock held, in trust, hereunder, for such beneficiary or beneficiaries, respectively, and the part or portion of said shares of said capital stock of any predeceased beneficiary or beneficiaries hereunder, passing to such children or issue, shall then and there become and be, and remain, a part of this Trust Estate, or Trust, and shall be administered, under the terms hereof, for and during the continuance of this Trust Estate or Trust.

5. Said Settlor, Donor and Trustee, F. A. Gillespie, hereby reserve the full right, power and authority, during [15] his lifetime, and while being and acting as said Trustee, to sell, dispose of and convey said Shares of Stock, and to reinvest the funds secured therefor, in such other form or Trust or Trust Estate, as he may deem best so to do, pre-

serving, however, at all times the due proportions of interests, respectively, as herein provided for, and likewise to change the form and investment of this Trust Estate, or Trust, as to him shall seem meet and proper, so preserving at all time, said due proportions of interest, respectively, as herein provided for.

6. Said beneficiaries, Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie shall not have any right, power or authority, jointly or severally, to sell, convey, transfer, pledge, incumber, mortgage, or in any way dispose of, the whole or any part of the shares of Capital Stock held hereunder, in trust, for them, and each of them, nor the dividends and income accruing by and from said shares of Capital Stock, and said Shares of Capital Stock, so held in trust for them, respectively, and said dividends and income, and every interest therein and thereto, shall at all times be free from, and not subject to, any debts of each, or either, or all of them, or for any indebtedness, or any claims, demands or causes of action whatsoever, that any person, corporation or company shall or may have, or claim, [16] or may claim to have, or that may be made against them, respectively, or any, or either, or all, or them.

7. Upon the death of all the beneficiaries herein named, to-wit: Maud Gillespie, B. A. Gillespie, L. A. Gillespie, P. A. Gillespie, and F. A. Gillespie, this Trust Estate and Trust shall cease and terminate, and said shares of said Capital Stock, or

the interest then existing in said Trust Estate, or Trust, shall thereupon pass absolutely to the remainder men then living, and herein and hereunder provided for, or, in the event, no such remainder men, specifically mentioned and provided for herein, shall then be living, to the heirs at law entitled thereto free and clear of any trust or restrictions herein provided for.

10. In Witness Whereof, I have hereunto set my hand and seal, this the 9th day of February, A. D., 1921.

[Seal] (Signed) F. A. GILLESPIE [17]

EXHIBIT "C"

AGREEMENT

This Agreement, made and entered into this 15th day of May, 1929, at the City of Los Angeles, in the County of Los Angeles, State of California, by and between F. A. Gillespie, a resident of Oklahoma, as party of the first part hereto and Maud Gillespie, a resident of the City of Los Angeles, State of California, as the party of the second part hereto.

Witnesseth:

That Whereas, the parties hereto intermarried on the 6th day of February, 1892, at Finley, Ohio, and ever since said date have been, and now are, husband and wife; and,

Whereas, the only issue of said marriage are three sons, named Bernard Gillespie, Lester Gillespie and Parmer Gillespie, all of whom are of legal age; and

Whereas, the parties hereto are now and ever since the 15th day of January, 1929 have been living separate and apart; and,

Whereas, the said second party did on the 2nd day of May, 1929, commence action against the said first party in the Superior Court of the State of California, in and for the County of Los Angeles, to secure permanent support and [18] for other relief, and which said action is known and designated upon the records and files of said court as No. D-74622; and,

Whereas, each of the said parties hereto is desirous of determining for both the present and future their respective property rights and their respective financial obligations toward one another;

Now, Therefore, in consideration of the premises and covenants hereinafter set forth, it is hereby mutually agreed as follows, to-wit:

First: In full and complete satisfaction of all financial claims and monetary demands and property claims and property rights of every nature, kind and character whatsoever that the said Maud Gillespie, said second party hereto, as wife, or as widow, or otherwise, has had or now has, or might hereafter have against the said F. A. Gillespie, said first party hereto or against the estate of said F. A. Gillespie, in the event of his death hereafter, as heirs-at-law or otherwise, and in consideration of

all other covenants and agreements in this agreement contained and on the part of the said Maud Gillespie to be kept and performed, the parties hereto do hereby agree each with the other as follows:

[19]

1. The real and personal property now owned by the parties hereto having been acquired since marriage, and therefore, being community property, is hereby transferred each to the other as follows:

The cash funds of the said Maud Gillespie shall be increased to the sum of One Hundred Thousand (\$100,000) Dollars in cash, which shall hereafter be her sole and separate property, and the cash funds of said F. A. Gillespie shall be increased to the sum of One Hundred Thousand (\$100,000) Dollars which shall hereafter be his sole and separate property;

The said F. A. Gillespie reserves to himself, and Maud Gillespie agrees to make any proper or necessary document or bill of sale to convey to the said F. A. Gillespie his personal effects, personal property, his own Paige automobile, and it is distinctly understood and agree that such personal effects and property of the said F. A. Gillespie shall remain in the home at Beverly Hills until such time as he sees fit to take possession of same;

The home place at Beverly Hills, California, shall be properly conveyed to Maud Gillespie, second party hereto, as her sole and separate property and the ranch at Oklahoma shall be properly conveyed to F. A. Gillespie as his sole [20] and separate prop-

erty, and the balance of the property, whether owned jointly or separately, or standing in the name of the parties hereto, or in the names of others, and particularly the securities in Vault No. 2014, Security-First National Bank of Los Angeles, the real estate in Oklahoma, the Gila Water Project, the Red Rover Copper stock, the claim against the Los Angeles Fisheries Company, shall all be properly conveyed to a corporation known as F. A. Gillespie and Sons Company, organized on the 24th day of April, 1920, under and by virtue of the laws of the State of Oklahoma, which company has a capital stock of One Million (\$1,000,000) Dollars, divided into Ten Thousand (10,000) shares of the par value of One Hundred Dollars each, and which corporation has three directors, to-wit; F. A. Gillespie, B. A. Gillespie and P. A. Gillespie, each of whom own five shares of stock of said corporation, and the balance of of Nine Thousand Nine Hundred Eighty-five (9985) shares stands in the name of F. A. Gillespie, as trustee for said members of his family under and pursuant to that certain Declaration of Trust dated February 9, 1921, a copy of which is hereto attached and made a part hereof.

2. In consideration of the conveyance of said property to such corporation, the said parties hereto agree to cause said corporation to pay to each of the parties hereto the sum of Fifteen Thousand (\$15,000) Dollars per year as long [21] as each of them shall live and further, that in addition to said sum of Fifteen Thousand (\$15,000) Dollars, the

said Maud Gillespie shall receive the sum of at least Ten Thousand (\$10,000) Dollars per year by way of dividends, and if for any reason dividends in the amount of Ten Thousand (\$10,000) Dollars per year is not available then in that event said corporation shall pay the said sum of Ten Thousand Dollars (\$10,000) additional to the said Maud Gillespie, it being the purpose and intention of this agreement that the said Maud Gillespie shall receive at least the sum of Twenty-five Thousand (\$25,000) Dollars per year cash from said corporation.

3. Said F. A. Gillespie agrees to cause to be made, executed and delivered contemporaneously herewith, to said Maud Gillespie, a bill of sale transferring to the said Maud Gillespie the household furniture, furnishings, fixtures, rugs, utensils, silverware and all other personal property now located in and being used as a part of said home place in Beverly Hills, California, and also a proper transfer of the title to those certain Marmon and Cadillac automobiles.

4. Both of the parties hereto agree to pay, contemporaneously with the execution of this agreement, to Walter E. Burke, the sum of Nine Thousand (\$9,000.00) Dollars in cash in full settlement of all attorneys fees heretofore [22] incurred or which may be hereafter incurred in the above mentioned action.

Second: All of the property of said Maud Gillespie, both real and personal, now held by her or which shall hereafter be acquired by her in any

manner whatsoever, shall be and remain her sole and separate property, free from any and all rights or claims of the said F. A. Gillespie, with full power to her to sell, convey, transfer, assign, mortgage, pledge, lease or deal with the same as if she were single. And the said F. A. Gillespie will from time to time, but only in such manner as not to create any personal liability on his part, execute any and all such deeds, conveyances, mortgages, pledges, leases and papers as may be necessary or proper to enable her to sell, convey, transfer, assign, mortgage, pledge, lease or deal with her said property as she chooses. And the said F. A. Gillespie does hereby waive and surrender any and all right, in the event of death of said Maud Gillespie, to act as the administrator of her estate, or to inherit any of her property as husband, or otherwise, and said F. A. Gillespie does hereby agree to never hereafter make any claim upon or against said Maud Gillespie or upon or against any of the property of said Maud Gillespie, either as surviving husband, or otherwise, or upon or against her estate, and said Maud Gil-

[23]

lespie shall have the uncontested right and privilege to dispose of any and all of her property by will, deed or otherwise as she sees fit, and on her death, in the lifetime of said F. A. Gillespie, all her separate estate, and all of her estate, both real and personal, which she shall not have disposed of in her lifetime or by will, shall, subject to her debts and engagements, go and belong to the person or persons who would have become entitled thereto if

the said F. A. Gillespie had died in the lifetime of said Maud Gillespie; and if the said F. A. Gillespie, he shall, without contest of any kind, permit her will to be proved, or administration upon her estate to be taken out by the person or persons who would have been entitled to do so had he, the said F. A. Gillespie, died in her lifetime.

Third: All of the property of the said F. A. Gillespie, both real and personal, except such as in this agreement is given or provided to be given to the said Maud Gillespie, and now held by him, or which shall hereafter be acquired by him in any manner whatsoever, shall be and remain his sole and separate property, free from any and all rights, and claims, except only as herein provided, of the said Maud Gillespie, with full power to him to sell, convey, transfer, assign, mortgage, pledge, lease or deal with the [24] same as if he were single. And the said Maud Gillespie will, from time to time (but only in such manner as not to create any personal liability on her part), execute any and all such deeds, conveyances, mortgages, pledges, leases and papers as may be necessary or proper to enable him to so sell, convey, transfer, assign, mortgage, pledge, lease or deal with his said property as he chooses. And the said Maud Gillespie, contemporaneously with the execution herewith, hereby agrees to properly execute and deliver to said F. A. Gillespie quit claim deeds to all of the property belonging to him and not hereinbefore given or granted to said Maud Gillespie.

And the said Maud Gillespie does hereby waive and surrender any and all right, in the event of the death of said F. A. Gillespie, to act as the administratrix of his estate, or to inherit any of his property as wife or otherwise, and said Maud Gillespie does hereby agree to never hereafter make any claim for support or maintenance or alimony, counsel fees or costs in any action for divorce or separate maintenance or otherwise or at all, upon or against said F. A. Gillespie or upon or against any of the property of said F. A. Gillespie, either as surviving wife or otherwise, or upon or against his estate, except as to and for said income, dividends and profits arising out of or payable from said trust estate or as in this agreement hereinbefore [25] provided, and said F. A. Gillespie shall have the uncontested right and privilege to dispose of any and all of his property as to said income, dividends and profits arising out of said trust estate as hereinbefore mentioned, by will, deed or otherwise, as he sees fit, and if the said F. A. Gillespie shall die in the lifetime of the said Maud Gillespie, she shall, without contest of any kind, permit his will to be proved, or administration upon his estate to be taken out by the person or persons designated in such will as the executors thereof, or by the person or persons who would have been entitled to do so had she, the said Maud Gillespie died in his lifetime.

Fourth: Said Maud Gillespie does hereby covenant, promise and agree never hereafter to charge or cause or permit to be charged to said F. A.

Gillespie any purchase which she may hereafter make, and never hereafter to secure any credit upon or in connection with said F. A. Gillespie or his name, and that she personally will promptly pay all debts and discharge all financial obligations hereafter incurred by her and that she will ever hereafter hold said F. A. Gillespie free and harmless from any and all debts and other obligations which may have been incurred or may hereafter be incurred by her, except as herein otherwise specifically provided. [26]

Fifth: Said first party does hereby agree with said second party that he will not at any time file any declaration of homestead against any property belonging to the second party and he does hereby relinquish and release all of his rights under any homestead law whatsoever in and to any property which second party now has or may hereafter acquire, and said second party does hereby agree with first party that she will not at any time file any declaration of homestead against any property belonging to first party and she does hereby relinquish and release all other rights under any homestead law whatsoever in and to any property which first party now has or may hereafter acquire.

Sixth: It is hereby agreed and understood that this agreement is intended as a full and complete settlement of all property rights and claims of every kind and character, nature or description whatsoever of each of the parties hereto against the other, either now existing or which may arise in the future,

and this agreement is not intended, and is not to be construed, as an agreement for, or contemplating, a divorce between the parties hereto or as a waiver of any cause of action for divorce or of any defense for an action for divorce which either party may have. [27]

Seventh: The parties hereto further agree to make, execute and deliver any necessary documents to carry out the purposes of this agreement.

Eighth: This agreement shall inure to the benefit of and be binding upon the heirs, executors, administrators and assigns of the respective parties hereto.

In Witness Whereof, the said parties here hereunto set their hands and seals, the day and year first above written.

[Seal]

F. A. GILLESPIE

[Seal]

MAUD GILLESPIE [28]

State of California,
County of Los Angeles—ss.

On this 23rd day of May, in the year nineteen hundred and twenty-nine, A. D. before me, Walter E. Burke, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared F. A. Gillespie and Maud Gillespie, personally known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my

hand and affixed my official seal the day and year in this certificate first above written.

[Seal] WALTER E. BURKE,
Notary Public in and for the County of Los Angeles,
State of California. [29]

EXHIBIT "D"

AGREEMENT

This Agreement, made and entered into this 15th day of May, 1929, by and between F. A. Gillespie, hereinafter for convenience called the "Husband", Maud Gillespie, hereinafter for convenience called the "Wife", and F. A. Gillespie and Sons Company, a corporation organized and existing under the laws of the State of Oklahoma, hereinafter for convenience called the "Corporation."

Witnesseth:

Whereas, the Husband and Wife, did, on the 15th day of May, 1929, make, execute and deliver a certain agreement by the terms of which they determined for all time their respective property interests, a copy of which agreement is attached hereto and made a part of this agreement, and,

Whereas, by the terms of said agreement the Husband and Wife have agreed to properly convey to the Corporation, real and personal property of the value of at least Three Million (\$3,000,000) Dollars, and,

Whereas, as part consideration for the transfer to said Corporation of said securities, the Corporation has agreed to pay to the Husband and Wife, each respectively, the sum of Fifteen Thousand (\$15,000) Dollars per year, and [30] in addition thereto, the Corporation guarantees to the said Wife that as long as she shall live she shall receive dividends in an amount of at least Ten Thousand (\$10,000) Dollars per year, and if for any reason funds are not available to be declared as dividends, then said Corporation shall cause to be paid to the said Wife the sum of Ten Thousand (\$10,000) Dollars per year. It being the purpose and intention of this agreement that the Corporation pay to Maud Gillespie herein called the Wife, the sum of at least Twenty-five Thousand (\$25,000) Dollars per year in the manner indicated in this paragraph, and,

Whereas, the beneficial interest in and to all of the stock of the Corporation is owned as set forth in that certain Declaration of Trust dated February 9, 1921, and signed by F. A. Gillespie as Trustee, a copy of which is hereto attached, and referred to for further particulars.

Now, Therefore, for and in consideration of the faithful performance of the terms and conditions of this agreement it is agreed as follows:

1. The Husband and Wife do hereby sell, set over and assign, deed and convey, and agree to properly transfer to the Corporation all of the real and personal property now standing in their names, or now held or owned jointly, severally, or as commu-

nity property by them or either of them, [31] excepting only to the Wife, the home at Beverly Hills, California, the house furnishings, personal property and the sum of One Hundred Thousand (\$100,000) Dollars and to the Husband the ranch near Tishomingo, Oklahoma, known as the Herford Springs Ranch, and the sum of One Hundred Thousand (\$100,000) Dollars. In consideration thereof, the Corporation agrees to pay to the Husband and Wife each, respectively, the sum of Fifteen Thousand (\$15,000) Dollars per year as long as they respectively live, and in addition thereto to pay to the said wife, dividends in at least the sum of Ten Thousand (\$10,000) Dollars per year, and if for any reason funds are not available to be paid as dividends in the manner herein indicated, then in that event the Corporation agrees to pay to the said Maud Gillespie herein called the Wife, the sum of Ten Thousand Dollars (\$10,000) per year, it being the purpose and intention of this agreement that the Corporation pay to the said Maud Gillespie in cash at least the sum of Twenty-five Thousand (\$25,000) Dollars per year hereafter. This in no way affects any salaries paid by the Corporation.

2. The Husband agrees with the wife and with the Corporation that he, the said F. A. Gillespie, will not sell or transfer any of the corporate stock of the corporation now standing of record in the records of the Corporation [32] in accordance with the terms of the Declaration of Trust dated February 9, 1921, hereinafter referred to, without the

written consent so to do of a majority of the Board of Directors of the Corporation.

4. In transferring to the Corporation and the securities now in Box No. 2014 in the Security-First National Bank of Los Angeles, it is definitely understood and agreed that the dividends or interest or coupons due to June 15, 1929, shall be paid and delivered to the said F. A. Gillespie.

5. It is further distinctly understood and agreed that each and all of the parties hereto agree to make and execute all necessary documents to complete the term and conditions of this agreement.

In Witness Whereof, the Corporation, F. A. Gillespie and Sons, has caused its corporation name to be hereunto signed by its duly authorized president and its seal to be hereunto affixed by its secretary, and the said F. A. Gillespie and Maud Gillespie have affixed their signatures hereto in the day and year first above written.

[Corporate Seal]

F. A. GILLESPIE AND SONS
COMPANY

F. A. GILLESPIE
President

Attest:

B. A. GILLESPIE,
Secretary

F. A. GILLESPIE
MAUD GILLESPIE [33]

State of California,
County of Los Angeles—ss.

On this 23rd day of May, in the year nineteen hundred and twenty-nine, A. D. before me, Walter E. Burke, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared F. A. Gillespie and Maud Gillespie personally known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] WALTER E. BURKE,
Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

On this 23rd day of May, in the year nineteen hundred and twenty-nine, A. D. before me Walter E. Burke, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and qualified, personally appeared F. A. Gillespie, known [34] to me to be the President and B. A. Gillespie, known to me to be the Secretary of the F. A. Gillespie and Sons Company, the corporation that executed the within and foregoing instrument, on behalf of the corpo-

ration therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said County, the day and year in this certificate first above written.

[Seal]

WALTER E. BURKE,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: U. S. B. T. A. Filed May 25, 1939.

[35]

[Title of Board and Cause.]

ANSWER

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits that the taxes in controversy are income taxes for the calendar year 1935. Denies the remainder of the allegations contained in paragraph 3 of the petition.
4. (a) and (b) Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. (a) and (b) Denies the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition. [36]

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the petition be denied and that the respondent's determination be in all respects approved.

Signed J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,
FRANK T. HORNER,
E. A. TONJES,
Special Attorneys,
Bureau of Internal Revenue.

EAT/W 6/24/39

[Endorsed]: U. S. B. T. A. Filed July 5, 1939.
[37]

[Title of Board and Cause.]

AMENDED PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of

deficiency, IT:R:E:2, OMS-90D, dated March 2, 1939, and as a basis of her proceeding, alleges as follows:

1. The address of the petitioner is 712 North Roxbury Drive, Beverly Hills, California.

2. The notice of deficiency, a copy of which is hereto attached, marked Exhibit "A", was mailed to the petitioner on March 2, 1939, by registered mail.

3. The tax in controversy is income tax for the calendar year 1935. The deficiency asserted in the ninety-day letter is \$1,476.55, which is the amount in controversy. [38]

4. The determination of the tax as set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in including in taxpayer's gross income the sum of \$17,666.25 received from F. A. Gillespie & Sons Company during the year 1935.

(b) The Commissioner of Internal Revenue erred in considering as annuity income the sum of \$17,666.25 received from F. A. Gillespie & Sons Company during the year 1935.

(c) In the alternative, if the Honorable Board determines that any part of the sum of \$17,666.25 received by Maud Gillespie from F. A. Gillespie & Sons Company during the year 1935 is taxable, then only such portion of \$17,666.25 is taxable as represents 3% of what an annuity would have cost

at May 15, 1929 as would have produced the sum of \$15,000 per annum during the lifetime of Maud Gillespie.

5. The facts upon which the petitioner relies in support of the foregoing assignments of error, and as a basis of this proceeding, are as follows:

(a) On the 9th day of February, 1921, a certain trust agreement was entered into by which F. A. Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie entered into a certain Declaration of [39] Trust. A true copy of said Declaration of Trust is attached to the original Petition filed in this case, marked Exhibit "B", and by reference thereto is made a part of this Amended Petition.

On the 15th day of May, 1929, F. A. Gillespie and Maud Gillespie entered into a certain agreement, a copy of which is attached to the original Petition filed in this case, marked Exhibit "C", and by reference thereto is made a part of this Amended Petition.

On the 15th day of May, 1929, a certain agreement was entered into between F. A. Gillespie, Maud Gillespie and F. A. Gillespie & Sons Company, a copy of which agreement is attached to the original Petition filed in this case, marked Exhibit "D", and by reference is incorporated and made a part of this Amended Petition.

Pursuant to the terms of the foregoing agreement, F. A. Gillespie & Sons Company paid over

to Maud Gillespie during the year 1935 the sum of \$17,666.25. Section 22 (a) (2) of the Revenue Act of 1934 is unconstitutional and not within the purview of the Sixteenth Amendment to the Constitution of the United States. The manner in which the Commissioner of Internal Revenue has sought to tax this taxpayer constitutes the taking of the taxpayer's property without compensation and constitutes an unconstitutional act upon the part of the Commissioner of Internal Revenue. [40]

(b) On the 9th day of February, 1921, a certain Trust Agreement was entered into by which F. A. Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie entered into a certain Declaration of Trust. A true copy of said Declaration of Trust is attached to the original Petition filed in this case, and marked Exhibit "B", and by reference thereto is made a part of this Amended Petition.

On the 15th day of May, 1929, F. A. Gillespie and Maud Gillespie entered into a certain agreement, a copy of which agreement is attached to the original Petition filed in this case and marked Exhibit "C", and by reference thereto is incorporated and made a part of this Amended Petition.

On the 15th day of May, 1929, a certain agreement was entered into between F. A. Gillespie, Maud Gillespie and F. A. Gillespie & Sons Company, a copy of which agreement is attached to the original Petition filed in this case, and marked Ex-

hibit "D", and by reference thereto is incorporated and made a part of this Amended Petition.

Pursuant to the terms of the foregoing agreement, F. A. Gillespie and Maud Gillespie transferred to F. A. Gillespie & Sons Company property having a cash cost value to them materially in excess of One Million Dollars (\$1,000,000). In accordance with the terms of the foregoing agreement and [41] in consideration of the transfer of the property before mentioned, F. A. Gillespie & Sons Company paid over to Maud Gillespie during the taxable year 1935 the sum of \$17,666.25. Prior to the year 1935, Maud Gillespie had received the sum of \$79,894.01, in consideration of the said transfer of property. Prior to the year 1935, F. A. Gillespie had received the sum of \$84,375.00 in consideration of the said transfer of property.

(c) Pursuant to the terms of the foregoing agreements set out as Exhibits "B", "C" and "D" of the original Petition filed in this case and incorporated herein by reference and made a part of this Amended Petition, F. A. Gillespie and Maud Gillespie delivered to F. A. Gillespie & Sons Company property having a value materially in excess of the cost of purchasing an annuity upon the life of F. A. Gillespie which would pay him the sum of \$15,000 per year, and an annuity upon the life of Maud Gillespie which would pay her a sum of \$15,000 per year, or \$20,000 per year, or \$25,000 per year, for life.

F. A. or Frank A. Gillespie was born in Venango City, Pennsylvania on April 22, 1868. An Annuity could have been purchased on May 15, 1929, upon the life of a male individual born on April 22, 1868, which would have paid the sum of \$15,000 per annum to said male individual for life for the sum of \$153,750. [42]

Maud Gillespie, nee Maud McCoy, was born in Oil City, Pennsylvania on June 9, 1872. An annuity could have been purchased on May 15, 1929, upon the life of a female individual born on June 9, 1872, which would have paid \$15,000 to said female individual for life for the sum of \$196,537.50. An annuity could have been purchased on May 15, 1929, upon the life of a female individual born June 9, 1872, which would have paid \$20,000 per annum to said female individual for life for the sum of \$262,550. An annuity could have been purchased on May 15, 1929, upon the life of a female individual born on June 9, 1872, which would have paid \$25,000 per annum to said female individual for life for the sum of \$327,562.50.

Wherefore, Petitioner prays that the Board may hear this proceeding and determine that there is no deficiency.

(Signed) HAROLD E. RORSCHACH

529 McBirney Building,
Tulsa, Oklahoma.

Counsel for Petitioner [43]

State of California

County of Los Angeles—ss.

Maud Gillespie, being duly sworn says that she is the taxpayer in the foregoing petition and that she has read said petition and is familiar with the statements therein contained and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts she believes to be true.

(Signed) MAUD GILLESPIE

Subscribed and sworn to before me this 28th day of November, 1939.

[Seal] (Signed) HELEN GILBERT
Notary Public

My commission expires: January 20, 1943.

[For Ex. "A" see Ex. "A" Attached to Petition.]

[Endorsed]: U. S. B. T. A. Filed Dec. 5, 1939.

[44]

[Title of Board and Cause.]

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits the allegations contained in paragraph 3 of the amended petition.

4. Denies that the Commissioner committed the errors alleged in subparagraph (a), (b) and (c) of paragraph 4 of the amended petition.

5(a). Admits the allegations set forth in the first three paragraphs of paragraph 5(a). Admits the allegations set forth in the first three lines of the fourth paragraph of paragraph 5(a). Denies the remaining allegations set forth in the fourth paragraph of paragraph 5(a) of the amended petition.

[45]

5(b). Admits the allegations contained in subparagraph (b) of paragraph 5 of the amended petition except that it is denied that prior to the year 1935 Maud Gillespie had received the sum of \$79,-894.01 in consideration of said transfer of property and that prior to the year 1935 F. A. Gillespie had received \$84,375.00 in consideration of said transfer of property.

5(c). Denies the allegations contained in subparagraph (c) of paragraph 5 of the amended petition.

6. Denies generally and specifically each and every allegation contained in the amended petition not heretofore admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL

JEM

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

JAMES L. BACKSTROM,

Division Counsel,

STANLEY B. ANDERSON,

Special Attorney,

Bureau of Internal Revenue.

JEM/meg 12/28/39

[Endorsed]: U. S. B. T. A. Filed Jan. 3, 1940.

[Title of Board and Cause.]

AMENDMENT TO AMENDED PETITION

Petitioner desires to amend her amended petition by striking therefrom paragraphs 5(a) and 5(b) and in lieu thereof, substituting the following:

5. The facts upon which the petitioner relies in support of the foregoing assignments of error, and as a basis of this proceeding, are as follows:

(a) On the 9th day of February, 1921, a certain trust agreement was entered into by which F. A. Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie entered into a certain Declaration of Trust. A true copy of said Declara-

tion of Trust is attached to the original Petition filed in this case, marked Exhibit "B", and by reference thereto is made a part of this Amended Petition.

On the 15th day of May, 1929, F. A. Gillespie and Maud Gillespie entered into a certain agreement, a copy [46] of which is attached to the original Petition filed in this case, marked Exhibit "C", and by reference thereto is made a part of this Amended Petition.

On the 15th day of May, 1929, a certain agreement was entered into between F. A. Gillespie, Maud Gillespie and F. A. Gillespie and Sons Company, a copy of which agreement is attached to the original Petition filed in this case, marked Exhibit "D", and by reference is incorporated and made a part of this amended petition.

Pursuant to the terms of the foregoing agreement, F. A. Gillespie & Sons Company paid over to Maud Gillespie during the year 1935 the sum of \$15,000.00. Section 22 (a) (2) of the Revenue Act of 1934 is unconstitutional and not within the purview of the Sixteenth Amendment to the Constitution of the United States. The manner in which the Commissioner of Internal Revenue has sought to tax this taxpayer constitutes the taking of the taxpayer's property without compensation and constitutes an unconstitutional act upon the part of the Commissioner of Internal Revenue.

(b) On the 9th day of February, 1921, a certain Trust Agreement was entered into by which F. A.

Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie entered into a certain Declaration of Trust. A true copy of said Declaration of Trust is attached to the [47] original Petition filed in this case, and marked Exhibit "B", and by reference thereto is made a part of this Amended petition.

On the 15th day of May, 1929, F. A. Gillespie and Maud Gillespie entered into a certain agreement, a copy of which agreement is attached to the original Petition filed in this case and marked Exhibit "C", and by reference thereto is incorporated and made a part of this Amended Petition.

On the 15th day of May, 1929, a certain agreement was entered into between F. A. Gillespie, Maud Gillespie and F. A. Gillespie & Sons Company, a copy of which agreement is attached to the original Petition filed in this case, and marked Exhibit "D", and by reference thereto is incorporated and made a part of this Amended Petition.

Pursuant to the terms of the foregoing agreement, F. A. Gillespie and Maud Gillespie transferred to F. A. Gillespie & Sons Company property having a cash cost value to them materially in excess of One Million Dollars (\$1,000,000.00). In accordance with the terms of the foregoing agreement and in consideration of the transfer of the property before mentioned, F. A. Gillespie & Sons Company paid over to Maud Gillespie during the taxable year 1935 the sum of \$15,000.00. Prior to the year 1935, Maud Gillespie had received the sum of \$79,894.01

in consideration of the said transfer of property. Prior to the year 1935, F. A. Gillespie [48] had received the sum of \$84,375.00 in consideration of the said transfer of property.

MAUD GILLESPIE

By: (Signed) HAROLD E. RORSCHACH

(Signed) HAROLD E. RORSCHACH

529 McBirney Building,

Tulsa, Oklahoma.

Counsel for Petitioner

State of Oklahoma

County of Tulsa—ss.

Harold E. Rorschach, being duly sworn, says that he is counsel for the petitioner above named and that he has read the amendment to said petition and is familiar with the statements therein contained and that the facts stated therein are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

(Signed) HAROLD E. RORSCHACH

Subscribed and sworn to before me this 15th day of May, 1940.

[Seal]

(Signed) IRMA ALLEN

Notary Public

My Commission expires March 30, 1944.

[Endorsed]: U. S. B. T. A. Filed at Hearing May 16, 1940. [49]

[Title of Board and Cause.]

ANSWER TO AMENDMENT TO AMENDED
PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to amended petition filed by the above-named taxpayer, admits and denies as follows:

5(a) Admits the allegations set forth in the first three subparagraphs of paragraph 5(a). Denies the allegations set forth in the fourth and last subparagraph of paragraph 5(a).

5(b). Admits the allegations contained in subparagraphs (b) of paragraph 5(b), except that it is denied (1) that F. A. Gillespie and Sons Company paid over to Maud Gillespie during the year 1935 the sum of \$15,000.00 (2) that prior to the year 1935 Maud Gillespie had received the sum of \$79,894.01 in consideration of said transfer of property, and (3) that prior to 1935 F. A. Gillespie had received the sum of \$84,375.00 in consideration of the said transfer of property. [50]

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the amendment to amended petition be denied.

(Signed) J. P. WENCHEL

JEM

Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

JAMES L. BACKSTROM,

Division Counsel.

STANLEY B. ANDERSON,

Special Attorney,

Bureau of Internal Revenue.

SBA/meg 6/24/40

[Endorsed]: U. S. B. T. A. Filed June 28, 1940.

[51]

REPORTER'S TRANSCRIPT

DEPOSITIONS OF CHARLES D. GREEN

and MAUD GILLESPIE,

taken on behalf of the Petitioner.

Beverly Hills, California Saturday, April 27, 1940.

APPEARANCES:

For the Petitioner: Harold E. Rorschach, Esq.

For the Respondent: Samuel Taylor, Esq.

Reported By: C. N. Olson.

C. N. Olson

Shorthand Reporter—Deposition Notary

817 H. W. Hellman Building

354 South Spring Street

Los Angeles, California

Mutual 2248 [52]

[Title of Board and Cause.]

ORDER

On motion of counsel for the petitioner, it is

Ordered, that the Order to Take Depositions issued in the above-entitled proceeding March 27, 1940 be and the same is hereby amended to provide for the taking of the deposition of Maud Gillespie on April 27, 1940 instead of April 26, 1940.

In all other respects the Order to Take Depositions issued March 27, 1940 shall remain unchanged.

[Seal]

(Signed) C. R. ARUNDELL

Member.

Dated: Washington, D. C., April 15, 1940.

cgh [53]

To the United States Board of Tax Appeals:

I, C. N. Olson, the person named in the foregoing order to take depositions, hereby certify:

1. That I proceeded, on the 27th day of April, A. D., 1940, at the residence of Maud Gillespie, 712 North Roxbury Drive, in the City of Beverly Hills, State of California, at 10:00 o'clock, A. M., under the said order and in the presence of Harold E. Rorschach, Esq. and Samuel Taylor, Esq., the counsel of the respective parties, to take the following depositions, viz:

Charles D. Green, a witness produced on behalf of the Petitioner;

Maud Gillespie, a witness produced on behalf of the Petitioner.

2. That each witness was examined under oath at such times and places as conditions of adjournment required, and that the testimony of each witness was taken stenographically and reduced to typewriting by me or under my direction.

3. That after the testimony of each witness had been reduced to writing the transcript of that testimony was read and signed by the witness in my presence, and that each witness acknowledged before me that his testimony was in all respects truly and correctly transcribed.

4. That, after the signing of the deposition in my presence, no alterations or changes were made therein.

5. That I have no office connection or business employment with the Petitioner or his attorney.

[Seal] (Signed) C. N. OLSON

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires December 23, 1941.
817 H. W. Hellman Building,
354 South Spring Street,
Los Angeles, California. [54]

[Title of Board and Cause.]

Be It Remembered that pursuant to Orders to Take Depositions and Amended Order and Stipulation, all hereunto annexed, and on the 27th day of April, 1940, at 10:00 o'clock, A. M., at 712 North

Roxbury Drive, Beverly Hills, Los Angeles County, State of California, before me, C. N. Olson, a notary public in and for said Los Angeles County, State of California, duly commissioned to administer oaths, personally appeared Charles D. Green and Maud Gillespie, called as witnesses on behalf of the Petitioner in the above-entitled action now pending before said Board, who, being by me first duly sworn, testified as follows:

Appearances:

For the Petitioner: HAROLD E. RORSCHACH, Esq.

For Respondent: SAMUEL TAYLOR, Esq. [55]

CHARLES D. GREEN,

called as a witness in behalf of the Petitioner, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Rorschach:

Q. Mr. Green, will you state your name?

A. Charles D. Green.

Q. How long have you lived in the vicinity of Santa Monica, Long Beach and Los Angeles?

A. Since 1909.

Q. What business were you engaged in from about 1926 to 1929?

(Deposition of Charles D. Green.)

A. I was engaged in the real estate business.

Q. And were you also engaged——

A. And building.

Q. In contracting and building? A. Yes.

Q. Were you familiar with and dealing with real property in the City of Santa Monica during that period?

A. No. I was familiar with it but I didn't deal in any property in Santa Monica during that time.

Q. But you were familiar with property in that general area?

A. I was familiar with property values.

Q. About May of 1929 were you familiar with Lots V, W, and X in Block 148 in the City of Santa Monica? A. Yes.

Q. Do you have an opinion as to the value of those three lots located [57] in the City of Santa Monica as of May 15, 1929?

A. I have an opinion.

Mr. Taylor: What is the materiality of that question, Mr. Rorschach?

Mr. Rorschach: To show the value of these lots which Mrs. Gillespie turned in and sold to the Corporation on May 15, 1929.

Mr. Taylor: Would you enter my objection on the ground of immateriality. [Overruled. Exception. S. B. H.]

Mr. Rorschach: Q. Do you have an opinion of the value of those three lots as of May 15, 1929?

A. Yes I have.

(Deposition of Charles D. Green.)

Mr. Taylor: Will it be stipulated that I object to each of these questions in regard to the opinion on the ground of immateriality? [Overruled. Exception. S. B. H.]

Mr. Rorschach: Yes.

Mr. Taylor: Then I won't make a separate objection.

Mr. Rorschach: That may be noted in the record it is agreed you object to the materiality of this line of questioning.

Q. What is your opinion with respect to that value?

A. My opinion is it was worth about \$800 a front foot, around \$120,000 for the property.

Q. Will you briefly state to the Board the location of these lots with respect to the City of Santa Monica and the ocean front?

A. Well, I consider them the best-located lots in Southern California for beach property.

Q. Well, where are they located?

A. They are on the ocean front with a perpetually-deeded park in front of them, one block south of Wilshire Avenue and one block north of Santa Monica Boulevard, two of the most prominent arteries in Southern California.

Q. On what street do they front?

A. They front on Ocean Avenue.

Q. Will you describe briefly where Ocean Avenue is located? [58]

A. Ocean Avenue runs,—it is the street nearest the ocean on top of the bluff in Santa Monica.

(Deposition of Charles D. Green.)

Q. Is it on what might be termed a beach or ocean highway?

A. Yes. It is also partially on 101 going north.

Q. Now you stated those lots are located facing on Ocean Avenue? A. Yes.

Q. Will you state if they are corner lots, and what other streets, if any, they face on?

A. Yes, they are corner lots and face on Arizona also.

Mr. Rorschach: That is all, Mr. Green. Do you have any questions to ask, Mr. Taylor?

Mr. Taylor: Yes.

Cross Examination

By Mr. Taylor:

Q. Will you repeat, Mr. Green, where these lots are?

A. These lots are on the corner of Ocean Avenue and Arizona Avenue in Santa Monica.

Q. They do not front right on the ocean?

A. They front right on the—are you familiar with that district?

Q. Yes, I am familiar with that area. Are they on top of the bluff?

A. Yes, they are on top, yes.

Q. Then they are not on the ocean as the beach clubs are? A. No, they are on top of the bluff.

Q. And in order to get to the ocean from them you have to go down the highway to the bottom?

A. Yes, that is right.

(Deposition of Charles D. Green.)

Q. They do not front on the ocean as, for example, Marian Davies' place? [59]

A. No. They front on the bluff.

Q. They front on the avenue on top of the bluff?

A. Yes.

Q. Then you go down to the highway that is on the level with the ocean, practically?

A. That is right.

Q. And then there are further lots which actually front on the ocean? A. That is right.

Q. But these lots are not in that second category? A. No.

Q. What is on these lots?

A. At the moment?

Q. What was on these lots, Mr. Green, as of May 15, 1929, the date of these transfers?

A. There was one old two-story residence and a little Indian store, just a little office building, just a little bit of a frame building.

Q. You state the value as \$800 a front foot?

A. That is correct, yes.

Q. That is based solely on the value of the land?

A. Solely on the value of the lots.

Q. What is next to these lots? Are they near the Miramar Hotel?

A. They are a block from the Miramar Hotel.

Q. What was next to these lots at the time of this transfer? A. Another old residence.

Q. Well, the value that you give then is more or less a potential value, isn't it, considering their possible use? A. Absolutely.

(Deposition of Charles D. Green.)

Q. It is not the actual value? [60]

A. Not the actual. It was the valuation that was generally considered on ocean lots as potential value, correct.

Q. Can you go into further detail, Mr. Green, as to the basis of your opinion? You state that you have never dealt in real estate. Now, how do you know or on what basis did you reach your figure?

A. Did I reach that belief? I reached it the same way, if I might explain this, that I base the present valuation. At that time we checked those lots as to——

Q. When you say “we” whom do you mean?

A. I was here on and off with Mr. Gillespie, another Mr. Gillespie, Mr. Parmer Gillespie, who I have been friends with for a number of years. I was in no way associated with him in business. But we checked those lots and a number of others for potential possibilities and that was the basis considered among real estate men that we questioned at that time, just as the present basis among real estate men at the present time on ocean frontage, potential possibilities with no buildings on them of any worth are placed at \$350 a front foot for inside lots and \$400 a front foot for others, and that is the basis for appraisals by the Los Angeles Realty Board appraisers.

Q. You base this opinion on discussions then with real estate men?

A. And what property was moving at, yes, that is right.

(Deposition of Charles D. Green.)

Q. Is your opinion based on your own knowledge or what these men told you?

A. I think opinions are always based more or less on information one can obtain.

Q. Prior to the time that you formed your opinion as to the value of these lots were you in the real estate business here in California or did you come here from another State, or what was the situation?

A. No, I was here in California in 1929.

Q. How long had you been in California at that time? A. Since 1901. [61]

Q. Since 1901? A. Yes, 1901.

Q. Were there any sales at the time of comparable lots, Mr. Green, that you were familiar with?

A. I couldn't definitely say there were of comparable lots, but at the time we were looking at this property properties were moving at around this price. If you are looking for a definite lot—we were looking at a number of them but I could not state a definite lot.

Q. You do not take into consideration then sales of comparable lots in the vicinity?

A. I would say at that time we did. If you ask me the specific lot, I could not give you that, but I do recall we were looking at several different lots down there, some of which—in fact, this property was moving quite rapidly at that particular time. All real estate in that vicinity was changing hands very rapidly.

(Deposition of Charles D. Green.)

Q. But your main reliance was upon the opinion of real estate men with whom you spoke?

A. Yes it was, with the addition that I can add that some of the real estate men that I spoke with were willing to substantiate their opinion with some considerable investment to go in with it.

Q. What was your business at the time, Mr. Green?

A. What business was I in at that time?

Q. Yes. A. In 1929?

Q. At the time that you valued these lots?

A. I was working in a real estate business with my father who at that time was located in Fresno—in Madera specifically, in the San Joaquin Valley.

Q. You were in the real estate business there?

[62]

A. Yes, I was working with him, actually more building and selling than in the actual real estate business. Father never did any so-called general real estate business. He did so-called speculative real estate business.

Q. Madera is about 350 miles from Santa Monica?

A. Yes Sir. However, I had been living in Long Beach. I was raised in Long Beach.

Q. Long Beach is about twenty miles from Santa Monica, is it? A. That is right.

Q. How long had you been living in Madera?

A. I think only about a year.

Q. And prior to that time?

A. I had been living in Long Beach.

(Deposition of Charles D. Green.)

Mr. Taylor: I object to Mr. Green's testimony, and also move to strike his testimony on the ground that it is hearsay, and upon the further ground that no proper foundation has been laid, and upon the ground that it is immaterial. That is all I have. [Sustained on ground of hearsay, and lack of qualification to testify as to value. Exception allowed. S. B. H.]

Redirect Examination

By Mr. Rorschach:

Q. Now, Mr. Green, with respect to the location of these lots to which you have testified, did I understand you to say that they faced the ocean and that across the street there is a perpetually-deeded park? A. A small parkway, yes.

Q. Well, the location of these lots, are they on a level with these beach homes, or is this location of the park and Ocean Avenue at this particular point located in some other way?

A. I will ask you to state that again. [63]
(The reporter read the pending question).

A. Yes, it is located about seventy feet above the beach.

Q. Then is the view from these lots affected in any way by the location or by the fact that they may be separated by the beach homes below the Palisades at that point?

A. No. They have a very excellent view of the ocean.

(Deposition of Charles D. Green.)

Q. Would you say that they have a better view or not than if they were located on the beach?

A. I would say they have a better view than if they were located on the beach. I would also say they are considerably safer property, due to continuous changing of our California beaches.

Mr. Rorschach: I think that is all.

Recross Examination

By Mr. Taylor:

Q. Mr. Green, I want to get into the record a description of the exact contour of the property there. Now, looking from the ocean inward——

A. Yes.

Q. First of all of course we have the ocean.

A. Yes.

Q. Then you have the beach.

A. That is right.

Q. Now right on that beach you have beach homes and beach clubs and other structures of that sort that face on one side on the ocean and then on the other side they face on the highway. I believe it is Highway 101?

A. That is right.

Q. Then you have this highway. Then on the other side of the highway you have a rather steep Palisades?

A. That is right. [64]

Q. I think Palisades is the proper name?

A. That is right.

Q. Now, except in a few places you cannot get up the Palisades. Now there is one place where there is an auto road up the Palisades?

(Deposition of Charles D. Green.)

A. Yes.

Q. Approximately at the location of these lots or within a few blocks either way?

A. From the road that comes up?

Q. Yes. A. Yes.

Q. Now you go up this auto road and then this auto road leads into a further street that is on top of the Palisades? A. Yes.

Q. Now, between this street and the ocean there is a City park? A. That is right.

Q. That you referred to?

A. Yes, that is right.

Q. Or Mr. Rorschach referred to as the perpetually-deeded park? A. Yes.

Q. Now, on the street there are street-car tracks?

A. That is right.

Q. It is an ordinary city street with automobile and bus traffic? A. Yes.

Q. It is rather a wide street? A. Yes.

Q. Then on the other side of this street away from the ocean and toward Los Angeles there is property, homes and hotels and stores and other property. Now, the lots that you refer to are on the other side of this street? [65]

A. That is right.

Q. Is that correct? A. That is right.

Q. These lots then are approximately 500 feet away from the high-water mark, are they not, and when I say these lots I mean the front of these lots?

A. Yes.

(Deposition of Charles D. Green.)

Q. The part of the lots that is nearest to the ocean? A. Yes, that is right.

Q. In this park from place to place there are various small buildings that the City of Santa Monica has erected, are there not?

A. I believe there are, several blocks from us, yes.

Q. Do you know whether as of the date there in 1929 when this transfer was made whether or not there were any buildings in front of these lots? Do you recall? A. I don't recall any, no.

Q. It is possible there were such, however?

A. Oh it is possible.

Q. As I recall, there were buildings scattered through there? A. Yes.

Q. Now, it is impossible from these lots to see the beach itself, isn't it?

A. No. Oh, what do you mean, standing down on the lot itself?

Q. Yes, I mean from the lot. How could you possibly see the beach? You could not because you have probably 200 feet of——

A. No, I would say you could not. That is right. No, you could not.

Q. You can perhaps see from the lots a distant view of the ocean? A. That is right.

Q. But not of the beach?

A. No. That is correct. [66]

Mr. Taylor: That will be all.

(Deposition of Charles D. Green.)

Redirect Examination

By Mr. Rorschach:

Q. Will you state, Mr. Green, with respect to these lots the location with respect to the Santa Monica Municipal Pier and Yacht Basin?

A. They are located two blocks, approximately two blocks from the Santa Monica Pier which leads to the Yacht Basin.

Q. And they are located on the high Palisades which overlooks the Pier and Yacht Basin and the ocean at that point?

A. That is right.

Mr. Rorschach: I think that is all.

The Witness: I would like to suggest my opinion is also enhanced by the fact we get away from considerable dampness which I think is against beach property, that is right down where they get the mist that comes off of the breakers. I know that from actual experience because I have lived on the beach in Long Beach most of my life.

Mr. Taylor: Q. Can you see the Pier and Yacht Basin from these lots, Mr. Green?

A. I will put it this way: From the lot, no, but no one would consider a view without some particular structure on it. You can see it from any first-floor structure.

Q. Can you see the whole Pier and Yacht Basin from the top of a first-floor structure?

A. I don't know whether you can see all of it or not. You can see part of it.

(Deposition of Charles D. Green.)

Q. To get to the Pier and Yacht Basin you have to go down the Palisades?

A. Yes. There is a road down in front of the pier. [67]

Mr. Taylor: That is all.

Mr. Rorschach: That is all.

(S) CHARLES D. GREEN

(Signature of the Witness).

Subscribed and sworn to before me this 29th day of April, 1940.

[Seal]

(S) C. N. OLSON,

Notary Public in and for the County of Los Angeles, State of California. [68]

MRS. MAUD GILLESPIE,

called as a witness in behalf of the Petitioner, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Rorschach:

Q. Will you state your name, Mrs. Gillespie?

A. Maud Gillespie.

Q. Are you the one and the same person as Mrs. F. A. Gillespie?

A. I am the same.

Q. And are you the same Maud Gillespie that was designated as beneficiary under a certain trust

(Deposition of Mrs. Maud Gillespie.)

agreement entered into between F. A. Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie on the 9th day of February, 1921 and attached to the petition which you have filed in the United States Board of Tax Appeals in this case and designated as Exhibit B?

A. Yes I am.

Q. You are the same Maud Gillespie?

A. Yes.

Q. Are you the same Maud Gillespie that entered into a certain agreement between F. A. Gillespie and Maud Gillespie on the 15th day of May, 1929 and attached to your petition filed in this case and designated as Exhibit C?

A. Yes I am.

Q. Are you the same Maud Gillespie that entered into a certain agreement on the 15th day of May, 1929, which agreement was between F. A. Gillespie, Maud Gillespie and F. A. Gillespie and Sons' Company, which agreement is attached to your petition and filed in this case and designated as Exhibit D?

[69]

A. Yes.

Q. Now, in accordance with the foregoing agreement did you set over and turn over property to F. A. Gillespie and Sons' Company?

A. Yes.

Q. What property did you turn over to the company as the result of this agreement, stating first the bonds and securities that were turned over?

A. Well I turned over United States bonds and State of Louisiana bonds to the amount of more than a million dollars.

(Deposition of Mrs. Maud Gillespie.)

Q. Did you turn over some other property to the company? A. Yes.

Q. Can you state what that property consisted of?

Mr. Taylor: May I ask what the purpose of this line of questioning is?

Mr. Rorschach: This is to show the transfer of this property pursuant to these contracts by Mrs. Gillespie, and the items of property.

Mr. Taylor: I see.

Mr. Rorschach: This is off the record.

(Discussion between counsel off the record).

(The reporter read the pending question).

A. Well, I turned over a building in Tulsa, Oklahoma called the Kress Building, and I turned over a home. I turned over \$100,000 in money, and in Oklahoma I turned over my interest in a stone quarry. I guess that was all.

Q. Did you turn over any property to the company pursuant to this agreement located in Santa Monica, California?

A. Yes. I had a fifth interest in some lots in Santa Monica which I turned over.

Q. Now, for the purposes of identification I hand you a deed dated the 18th of February, 1932 in which F. A. Gillespie and Maud Gillespie appear [70] as grantors and F. A. Gillespie and Sons' Company appears as grantee, conveying part of Lot 7 in Block 104 in the original town of Tulsa, and I ask you if that is your signature which appears at

(Deposition of Mrs. Maud Gillespie.)

the bottom of the deed, Maud Gillespie? (Handing document to the witness). A. Yes, it is.

Q. I hand you a deed dated the 18th of February, 1932 in which Frank A. Gillespie and Maud Gillespie appear as grantors and F. A. Gillespie and Sons' Company appears as grantee, conveying Lot 6 and the west thirty feet of Lot 7 in Block 8 of North Tulsa, addition to the City of Tulsa, and ask you if that is your signature which appears at the bottom of the deed? (Handing document to the witness).

A. Yes, that is my signature.

Q. I hand you a deed dated June 22, 1934 in which L. A. Gillespie, Maud Gillespie and B. A. Gillespie, being all of the directors of the Bromide Oolitic Stone Company, appear as grantors and F. A. Gillespie and Sons' Company appears as grantee, covering certain lands located in Sections 4 and 9 in Township 2 South, Range 8 East, Johnston County, Oklahoma, and ask you if the signature appearing at the bottom of the deed along with the signature of L. A. Gillespie and B. A. Gillespie is your signature? (Handing document to the witness). A. Yes, it is.

Q. I hand you a deed dated June 25, 1932, in which V. R. Irvin and Edna E. Ervin, his wife; M. C. Smith and Marjorie V. Smith, his wife; P. A. Gillespie and Marguerite Gillespie, his wife, and Maud Gillespie, a single woman, appear as grantors

(Deposition of Mrs. Maud Gillespie.)

and P. A. Gillespie appears as grantee covering Lots V. W and X in Block 148 of the City of Santa Monica, and ask you if among the other signatures appears your signature as Maud Gillespie? (Handing document to the witness).

A. Yes, that is my signature. [71]

Q. When were you and Mr. F. A. Gillespie married?

A. We were married on the 6th of February, 1892.

Q. When and where were you born?

A. I was born in Oil City, Pennsylvania.

Q. On what date? A. On June 9, 1872.

Q. 1872? A. 1872

Q. Do you know when and where Mr. A. F. Gillespie was born?

A. He was born in Oil City, Pennsylvania, and he was born on April 22, 1868.

Q. Now, at the time you and Mr. Gillespie were married did you own any property?

A. No, I did not.

Q. Did Mr. Gillespie own any property?

A. No he did not.

Q. During the time that you and Mr. Gillespie were married did either you or Mr. Gillespie inherit any property? A. No.

Q. Then the property to which you have testified and which is referred to in this contract was acquired during the time you and Mr. Gillespie were married? A. Yes.

(Deposition of Mrs. Maud Gillespie.)

Q. And was it acquired by the two of you?

A. By the efforts of both.

Q. Now, this contract of May 15, 1929 by which you were obliged to turn over this property to the company, did you turn over the property and execute the deeds and documents and conveyances and all the matters that pertained to the dividends of \$10,000 a year? Have you made any change with respect to those payments, or any amendment to that contract? [72]

A. Yes I have.

Q. Do you recall the nature of that change?

A. Well I was receiving—shall I tell you the amount I was receiving at that time?

Q. Yes.

A. I was receiving \$15,000 a year in monthly payments and at the end of the year \$10,000 I suppose in the nature of a dividend, and I turned back the \$10,000 to the company for investment provided that Mr. Gillespie would do the same thing.

Q. And has that agreement been carried out?

A. Yes it has.

Q. Now, under the terms of this contract entered into on May 15, 1929 did the company pay you anything during the calendar years 1929, 1930 and 1931?

A. No they did not.

Q. Did the company pay you anything in the year 1932?

A. Yes. I got \$19,500 in 1932.

Mr. Taylor: How is this material?

(Discussion off the record between counsel).

(Deposition of Mrs. Maud Gillespie.)

Mr. Taylor: I move to strike that answer on the ground of immateriality. [Denied. Exception allowed. S. B. H.]

Mr. Rorschach: Q. Now, did you receive any other sum in the year 1932?

Mr. Taylor: I object on the ground of immateriality.

A. Am I to answer the question?

Mr. Rorschach: Yes, you are to answer.

A. Oh, I thought he objected.

Mr. Taylor: My objection is just for the record.

A. Oh yes. Well, I received \$15,394.01.

Mr. Rorschach: Q. What was the nature of that payment? [73]

A. Well, that was to adjust the account——

Mr. Taylor: Objected to as immaterial.

A. —for the previous years of 1929, 1930 and 1931.

Mr. Rorschach: Q. How much did the company pay you in 1933?

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. H.]

A. \$25,000.

Mr. Rorschach: Q. How much did the company pay you in 1934 on account of this contract?

Mr. Taylor: Objected to as immaterial. [Overruled—exception allowed. S. B. H.]

A. \$20,000.

Mr. Rorschach: Q. And how much did the company pay you in the year 1935?

(Deposition of Mrs. Maud Gillespie.)

A. \$17,666.25.

Q. Now, under this amended agreement the company was obliged to pay you \$15,000 for the year 1935. Can you explain the additional \$2,666.25 that was paid you in 1935 by the company?

A. Well, I had a mortgage on a building in Hollywood and I didn't have the money to pay it so they lent me the money to pay that mortgage off.

Q. And what was the amount of that that they let you have?

A. Well, they let me have \$2,666.25.

Q. How much did the company pay you in 1936?

A. \$19,000.

Q. And under the terms of this agreement—

Mr. Taylor: I object to that and I move to strike that last answer as immaterial. [Overruled. S. B. Hill.]

Mr. Rorschach: Q. Under the terms of this agreement you were to be paid \$15,000. Can you explain the additional \$4,000?

A. Well, they lent me \$4,000 to pay off the mortgage on this same building [74] that I mentioned before.

Q. Now, going back to the year 1934 you were entitled to receive \$15,000 under your amended contract in that year but you testified they paid you \$20,000. Can you explain the difference there of \$5,000?

Mr. Taylor: Objected to as immaterial. [Overruled. S. B. Hill]

(Deposition of Mrs. Maud Gillespie.)

A. The additional \$5,000 was an adjustment on the 1932 dividend guarantee.

Mr. Rorschach: Q. Now, how much did you receive from the company in 1937?

A. \$15,000.

Mr. Taylor: Objected to as immaterial. [Overruled. S. B. Hill.]

Mr. Rorschach: Q. How much did you receive in 1938?

Mr. Taylor: Objected to as immaterial. [Overruled. S. B. Hill.]

A. \$15,000.

Mr. Rorschach: Q. And how much have you received in 1939?

Mr. Taylor: Objected to as immaterial. [Overruled. S. B. Hill.]

A. \$15,000.

Mr. Rorschach: Q. And how have you been receiving these payments over the years?

Mr. Taylor: Objected to as immaterial. [Overruled. S. B. Hill.]

A. Well, twelve payments of \$1250.

Mr. Rorschach: Q. \$1250 every month.

A. Every month, yes.

Q. Now, with respect to the F. A. Gillespie and Sons' Company what interest or what beneficial interest have you considered that you owned in the company in accordance with the trust agreement of 1921?

(Deposition of Mrs. Maud Gillespie.)

Mr. Taylor: Objected to as immaterial. [Sustained. Exception allowed. S. B. Hill.]

A. A half interest.

Mr. Rorschach: I do not mean the property. I want to refresh your [75] recollection. The company and not the property now, the F. A. Gillespie and Sons' Company.

A. State the question again?

(The reporter read the pending question.)

A. Well, I had a one-fifth interest.

Q. And who owns the other beneficial four-fifths interest?

Mr. Taylor: Objected to as immaterial. [Sustained. Exception allowed. S. B. Hill.]

A. F. A. Gillespie and his three sons, my three sons.

Mr. Rorschach: Q. And is there any provision with respect to others in that trust agreement?

A. I don't understand that.

Q. Any provision with respect to other members of your family in that trust agreement?

Mr. Taylor: Objected to as the trust agreement is the best evidence.

Mr. Rorschach: Q. Do you have any provision in there with respect to your grandchildren?

A. Oh yes, surely, I turned this over so that my sons and my grandchildren would benefit by it.

Mr. Taylor: I move to strike that answer as not responsive, and immaterial. [Sustained. Exception allowed. S. B. Hill.]

(Deposition of Mrs. Maud Gillespie.)

Mr. Rorschach: Q. When you sold and transferred this property to the company in accordance with the contract of May 15, 1929, how did you contemplate being paid for your property?

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. Well—state that again?

(The reporter read the pending question.)

A. Well, I was—I got my monthly payments. I don't think I hardly understand. [76]

Mr. Rorschach: Q. Well, did you expect to be paid at the rate of \$15,000 a year for life with this additional guarantee of \$10,000?

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. Yes, that is right. That is what I did expect.

Mr. Rorschach: Q. And the residue in excess of the amount which you received, what did you expect to have done with that?

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. Well, I figured that turned into the company for the benefit of my children and my grandchildren.

Mr. Rorschach: Q. Prior to May 15, 1929, had you ever made an inquiry from any insurance or trust company as to the cost of acquiring an annuity on your life?

(Deposition of Mrs. Maud Gillespie.)

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. No, I never did.

Mr. Rorschach: Q. Had you ever contemplated purchasing an annuity?

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. No, I never did.

Mr. Rorschach: Q. When you and Mr. Gillespie had reached a property settlement what did you consider the best thing to do to safeguard your property interests and to protect your children and your grandchildren?

Mr. Taylor: Objected to as immaterial. The trust agreement is the best evidence. [Overruled. Exception allowed.]

A. Will you re-state that?

Mr. Rorschach: Repeat the question, please?

(The reporter read the pending question.)

A. Well, I made—I gave my property to the company to safeguard my children and my grandchildren.

Q. And with the provision that you were to be paid during your life-time? [77] A. Yes.

Q. Certain sums? A. Yes.

Q. And did you consider the remainder over the value of this property as a gift or contribution to your children?

Mr. Taylor: Objected to as immaterial, and the

(Deposition of Mrs. Maud Gillespie.)

trust agreement is the best evidence. [Overruled. Exception allowed. S. B. Hill.]

A. It was just a gift to my children and my grandchildren.

Mr. Taylor: I move to strike that answer on the same grounds. [Motion denied. Exception allowed. S. B. Hill.]

Mr. Rorschach: Q. Do you have any other children besides P. A. Gillespie or Parmer A. Gillespie, and L. A. or Lester A. Gillespie, and B. A. or Bernard A. Gillespie? A. No I don't.

Q. Were these three sons, Bernard, Lester and Parmer, sons born of your marriage with F. A. Gillespie? A. Yes, they were.

Q. Do these three sons have any children?

A. Yes.

Q. Can you name the grandchildren?

A. Well, there is Bernard Gillespie, Junior, and Jerry Gillespie and Gloria Gillespie and Frank Gillespie and Parmer Gillespie and Rhonda Gillespie.

Q. Now, will you state which of these grandchildren are the grandchildren of the sons—in other words, which are Lester's?

A. Lester's are two girls, Gloria and Jerry; Bernard has one son, Bernard, Junior; the other three belong to Parmer.

Q. Have you ever tried to borrow money or raise any money through a bank or trust company on the basis of the payments which you were to receive in the future in accordance with the contract

(Deposition of Mrs. Maud Gillespie.)

of May 15, 1929, which is between the company [78] and yourself?

Mr. Taylor: Objected to as immaterial. [Sustained. Exception allowed. S. B. Hill.]

A. No I have not.

Mr. Rorschach: Q. Have you ever made any inquiry as to whether you might be able to borrow on that contract?

Mr. Taylor: Objected to as immaterial. [Sustained. Exception allowed. S. B. Hill.]

A. No. I think I talked to one of my sons about it. I did. But I never tried to borrow anything.

Mr. Rorschach: Q. Did you have your son make any inquiry?

Mr. Taylor: Objected to as immaterial. [Sustained. Exception allowed. S. B. Hill.]

A. I think my son talked to the Security Bank but there could not be any money borrowed on this contract.

Mr. Rorschach: Q. Now, you have testified concerning the property which you conveyed to F. A. Gillespie and Sons' Company by virtue of this contract of May 15, 1929. What interest in this property that was conveyed did you consider that you owned?

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. Well, I owned half of it.

Mr. Rorschach: Q. And did you feel or consider that F. A. Gillespie owned the other half?

(Deposition of Mrs. Maud Gillespie.)

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. Yes I did.

Mr. Rorschach: I believe that is all.

(Discission between counsel off the record.)

Cross Examination

By Mr. Taylor:

Q. Mrs. Gillespie, you have testified that a change was made in the agreement [79] between yourself, Mr. F. A. Gillespie and the corporation to the effect that you turned \$10,000 and he turned \$10,000 over to the corporation for re-investment, is that correct? A. Yes.

Q. What that change made in writing or was that just an oral understanding between yourself and Mr. Gillespie?

A. Well I think—I am not sure but I think I wrote a letter to them saying that I would do that.

Q. When you say “them” to whom do you refer?

A. F. A. Gillespie and Sons’ Company. It was also verbal but I think I wrote them a letter saying I would do that.

Q. When was that?

A. Can you give me the date? I don’t remember the date, but it is—let’s see if I can get the date out of this. (Referring to sheet of paper.) I cannot give you the date. It has been a long time ago though.

(Deposition of Mrs. Maud Gillespie.)

Q. But it was prior to the year 1935?

A. Yes.

Q. Did that refer to just one single year?

A. No. It was from that time on.

Mr. Taylor: I would like to move to strike the testimony of Mrs. Gillespie with regard to her purpose in turning over certain property to the F. A. Gillespie and Sons' Company and her testimony with regard to turning over certain properties for the benefit of her children and grandchildren and her testimony with regard to making a gift or intent to make a gift to her children and grandchildren on the ground that the testimony and each item thereof are immaterial; on the ground that the testimony is in conflict with the parol-evidence rule; on the further ground the agreements attached as Exhibits C and D to the petition in this case are the best evidence as to why Mrs. Gillespie turned over this property, if [80] that is considered material, and as to the rights that she and others obtained thereunder, and are also the best evidence as to her purpose in turning over her property and as to whether any gifts were made to her children and grandchildren by turning over the property. [Motion denied. Exception allowed. S. B. Hill.]

I have no more questions. That is all at this time.

(Deposition of Mrs. Maud Gillespie.)

Mr. Rorschach: I offer in evidence as Petitioner's Exhibit number 1 deed heretofore referred to as deed dated February 18, 1932, between F. A. Gillespie and Maud Gillespie, grantors and F. A. Gillespie and Sons' Company, grantee, conveying part of Lot 7 in block 104, original town of Tulsa, Oklahoma.

(Whereupon the notary marked said above-mentioned deed "Petitioner's Exhibit number 1 for identification. C. N. Olson, notary public. 4/27-'40.'")

PETITIONER'S DEPOSITION EXHIBIT

NO. 1

[Book 1014, Page 302

465197]

GENERAL WARRANTY DEED

This Indenture: Made this 18th day of February, A. D. 193....., between F. A. Gillespie and Maud Gillespie, husband and wife, of Tulsa County, in the State of Oklahoma, parties, grantors, and F. A. Gillespie & Sons, a corporation, of Tulsa, Oklahoma, party, grantee.

Witnesseth, That in consideration of the sum of Dollars, receipt of which is hereby acknowledged, said parties, grantors, do, by these presents, grant, bargain, sell and convey unto said party, grantee, its assigns, all of the following described real estate, situated in the County of Tulsa, State of Oklahoma, to-wit:

(Deposition of Mrs. Maud Gillespie.)

All that part of Lot Seven (7) in Block One Hundred Four (104), of the Original Town, now City of Tulsa (Tulsa County), Oklahoma, described as follows, to-wit:

Beginning at the Southwest corner of said lot, running thence Northerly along the West line of said lot 75 feet 9½ inches; running thence Easterly 59 feet 6½ inches to a point 75 feet 9 inches Northerly and at right angles from the South line of said lot; thence Southerly parallel with the West line of said lot 25 feet 9 inches; thence Easterly on a line parallel with the South line of said lot 5 feet 5½ inches; thence Southerly on a line parallel with the Westerly line of said lot 50 feet to the Southerly line of said lot, and thence Westerly along the Southerly line of said lot 65 feet to the place of beginning.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining forever.

And said parties, grantors, F. A. Gillespie and Maud Gillespie, their heirs, executors or administrators do hereby covenant, promise and agree to and with said part... grantee..., at the delivery of these presents that they lawfully seized in their own right of an absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted and described premises, with the appur-

(Deposition of Mrs. Maud Gillespie.)

tenances; that the same are free, clear, and discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances, of whatsoever nature and kind.

Except: leases and encumbrances of record, and all other liens, and that parties grantors will warrant and forever defend the same unto the said party grantee, its assigns, against said parties, grantors, their heirs or assigns and all and every person or persons whomsoever lawfully claiming or to claim the same.

In witness whereof, the said parties grantors, have hereunto set their hands the day and year first above written.

MAUD GILLESPIE,
F. A. GILLESPIE.

OKLAHOMA FORM OF ACKNOWLEDGMENT.

State of Oklahoma, County of Oklahoma—ss.

On this 18th day of February, A. D. 1932, before me, the undersigned, a Notary Public, in and for said County and State aforesaid personally appeared F. A. Gillespie and husband and wife, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that they executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

(Deposition of Mrs. Maud Gillespie.)

Given under my hand and seal of office the day and year last above written.

[Seal]

PEARL KIMBLE,
Notary Public.

My commission expires Sept. 9, 1935. [83]

[Book 1014, Page 303]

State of Oklahoma, County of Tulsa—ss.

On this 18th day of February, A. D. 1932, before me, the undersigned, a Notary Public, in and for said County and State aforesaid personally appeared Maud Gillespie, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal of office the day and year last above written.

NORMA WHEATON,
Notary Public.

My commission expires Sept. 12, 1935.

No. 465197

General Warranty Deed

From

F. A. Gillespie, et ux
to

F. A. Gillespie & Sons Company,
Box 1925, Tulsa

Recorded Feb. 23, 1932. [84]

(Deposition of Mrs. Maud Gillespie.)

Mr. Rorschach: I offer in evidence as Petitioner's Exhibit number 2 deed heretofore described as deed from Frank A. Gillespie and Maud Gillespie, husband and wife, grantors to F. A. Gillespie and Sons' Company, grantee, dated February 18, 1932, conveying Lot 6 and the west thirty feet of Lot 7, Block 8 of North Tulsa, addition to the City of Tulsa, Oklahoma.

(Whereupon the notary marked said above-mentioned deed "Petitioner's Exhibit number 2 for identification. C. N. Olson, notary public. 4/27-'40.")

PETITIONER'S DEPOSITION EXHIBIT

No. 2

[Book 1014, Page 300

465196]

GENERAL WARRANTY DEED

This Indenture: Made this 18th day of February, A. D. 193....., between Frank A. Gillespie and Maud Gillespie, husband and wife, of Tulsa County, in the State of Oklahoma, parties, grantors, and F. A. Gillespie & Sons Company, a corporation of Tulsa, Oklahoma, party, grantee,

Witnesseth, That in consideration of the sum of DOLLARS, receipt of which is hereby acknowledged, said parties grantors, do, by these presents, grant, bargain, sell and convey unto said party grantee, its assigns, all of the following described real estate, situated in the County of Tulsa, State of Oklahoma, to-wit:

(Deposition of Mrs. Maud Gillespie.)

Lot Six (6) and the West thirty feet (30 ft.) of Lot Seven (7), all in Block Eight (8) of North Tulsa, an addition to the City of Tulsa.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining forever.

And said parties grantors, Frank A. Gillespie and Maud Gillespie, their heirs, executors or administrators do hereby covenant, promise and agree to and with said part... grantee..., at the delivery of these presents that they lawfully seized in their own right of an absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, and discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances, of whatsoever nature and kind,

Except: taxes and special assessments, and all other liens, and that parties grantors will warrant and forever defend the same unto the said party grantee, its assigns, against said parties grantors, their heirs or assigns and all and every person or persons whomsoever lawfully claiming or to claim the same.

In witness whereof, the said parties grantors, have hereunto set their hands the day and year first above written.

MAUD GILLESPIE,
FRANK A. GILLESPIE.

(Deposition of Mrs. Maud Gillespie.)

OKLAHOMA FORM OF ACKNOWLEDGMENT.

State of Oklahoma, County of Tulsa—ss.

On this 18th day of February, A. D. 1932, before me, the undersigned, a Notary Public, in and for said County and State aforesaid personally appeared Frank A. Gillespie and husband and wife, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal of office the day and year last above written.

[Seal]

PEARL KIMBLE,
Notary Public.

My commission expires Sept. 9, 1935. [85]

[Book 1014, Page 301]

State of Oklahoma, County of Tulsa—ss.

On this 18th day of February, A. D. 1932, before me, the undersigned, a Notary Public, in and for said County and State aforesaid personally appeared Maud Gillespie, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

(Deposition of Mrs. Maud Gillespie.)

Given under my hand and seal of office the day and year last above written.

NORMA WHEATON,
Notary Public.

My commission expires Sept. 12, 1932.

No. 465196

General Warranty Deed

From

Frank A. Gillespie, et ux,

to

F. A. Gillespie & Sons Company,

Box 1925

Recorded Feb. 23, 1932. [86]

Mr. Rorschach: I offer in evidence as Petitioner's Exhibit 3 that certain deed heretofore described, dated the 22nd of June, 1934, in which L. A. Gillespie and Maud Gillespie and B. A. Gillespie, being all of the directors of the Bromide Oolitic Stone Company appear as grantors and F. A. Gillespie and Sons' Company as grantee, covering certain lands located in Sections 4 and 9 in Township 2 South, Range 8 East, Johnston County, Oklahoma.

(Whereupon the notary marked said above-mentioned deed "Petitioner's Exhibit number 3 for identification. C. N. Olson, notary public. 4/27-'40.")

(Deposition of Mrs. Maud Gillespie.)

PETITIONER'S DEPOSITION EXHIBIT
NO. 3

GENERAL WARRANTY DEED.

This Indenture, Made this 22nd day of June, A. D. 1934, between L. A. Gillespie, Maud Gillespie and B. A. Gillespie, "Being all of the Directors of the Bromide Oolitic Stone Company", Trustees, of Tulsa County, in the State of Oklahoma, of the first part, and F. A. Gillespie & Sons Company, an Oklahoma Corporation, of the second part.

Witnesseth, That in consideration of the sum of Ten (\$10.00) dollars, the receipt whereof is hereby acknowledged, said parties of the first part, does by these presents grant, bargain, sell and convey unto said party of the second part, its heirs and assigns, all of the following described real estate situated in the County of Johnston, State of Oklahoma, to-wit:

The West Half ($W\frac{1}{2}$) of the Southwest Quarter ($SW\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) and the West Half ($W\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$); and the North Half ($N\frac{1}{2}$) of the Southwest Quarter ($SW\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$); and the Southeast Quarter ($SE\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section Four (4), and the Northeast Quarter ($NE\frac{1}{4}$) and the South Half ($S\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); and the East Half ($E\frac{1}{2}$) of

(Deposition of Mrs. Maud Gillespie.)

the Southwest Quarter ($SW\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); and the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); and the Northeast Quarter ($NE\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) and the East Half ($E\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$); and the North Half ($N\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$); and the Southeast Quarter ($SE\frac{1}{4}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$); and the West Half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$); and the West Half ($W\frac{1}{2}$) of the East Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section Nine (9), Township Two (2) South, Range Eight (8) East.

stamp

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining forever.

And said L. A. Gillespie, Maud Gillespie, & B. A. Gillespie, Trustees, their heirs, successors, executors or administrators, does hereby covenant, and agree to and with said party of the second part at the delivery of these presents they are lawfully seized in their own right of an absolute and indefeasible estate of inheritance in fee simple, of and in, all and singular, the above granted and described premises, with appurtenances; that the same are free, clear and discharged and unincumbered of and from

(Deposition of Mrs. Maud Gillespie.)

all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances, of whatsoever nature and kind, except none, and that they will warrant and forever defend the same unto said party of the second part, its heirs, and assigns, against said parties of the first part, their heirs and successors assigns, and all and every person or persons whomsoever, lawfully claiming or to claim the same.

In witness whereof, the said parties of the first part have hereunto set their hands this the day and year first above written.

BROMIDE OOLITIC STONE COMPANY,

By L. A. GILLESPIE,
MAUD GILLESPIE,
B. A. GILLESPIE,

Trustees.

[87]

OKLAHOMA ACKNOWLEDGMENT.

State of Oklahoma, County of Tulsa—ss.

Before me, the undersigned, a Notary Public, in and for said County and State, on this 22nd day of June, 1934, personally appeared L. A. Gillespie, Maud Gillespie and B. A. Gillespie, Trustees of the Bromide Oolitic Stone Company and to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that have executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

(Deposition of Mrs. Maud Gillespie.)

Given under my hand and seal the day and year last above written.

[Seal]

RUTH REYNOLDS,
Notary Public.

My commission expires April 14, 1938.

ACKNOWLEDGMENT FOR CORPORATION.

State of Oklahoma, County of Tulsa—ss.

On this 22nd day of June, A. D. 1934, before me, the undersigned, a Notary Public, in and for the County and State aforesaid, personally appeared L. A. Gillespie, B. A. Gillespie and Maud Gillespie, to me known to be the identical persons who subscribed the name of the maker thereof to the foregoing instrument as its Directors & Trustees and acknowledged to me that they executed the same as their free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Given under my hand and seal of office the day and year last above written.

[Seal]

RUTH REYNOLDS,
Notary Public.

My commission expires April 14, 1938.

(Deposition of Mrs. Maud Gillespie.)

No. 66256—Form No. 30

General Warranty Deed

State of Oklahoma, County of Johnston—ss.

This instrument was filed for record on the 10th day of Oct., 1934, at 1:20 o'clock P. M., and duly recorded in Book 43D, Page 521 of the records of this office.

G. R. WHITE,

County Clerk—Register of Deeds.

By LENA THOMAS, Deputy.

When recorded return to F. A. Gillespie & Sons Company, Box 1925, Tulsa, Oklahoma. [88]

Mr. Rorschach: I offer in evidence as Petitioner's Exhibit number 4 grant [81] deed heretofore referred to, dated June 25, 1932, wherein V. R. Irvin and Edna E. Irvin, his wife; M. C. Smith and Marjorie V. Smith, his wife; P. A. Gillespie and Marguerite Gillespie, his wife, and Maud Gillespie, a single woman, appear as grantors and P. A. Gillespie appears as grantee, covering Lots V. W. and X in Block 148 of the City of Santa Monica, California.

(Whereupon the notary marked said above-mentioned deed "Petitioner's Exhibit number 4 for identification. C. N. Olson, notary public. 4/27-'40.")

(Deposition of Mrs. Maud Gillespie.)

PETITIONERS'S DEPOSITION EXHIBIT

NO. 4

GRANT DEED

V. R. Irvin and Edna E. Irvin, his wife

M. C. Smith and Marjorie V. Smith, his wife

P. A. Gillespie and Marguerite Gillespie, his wife

Maude Gillespie, a single woman

in consideration of ten dollars and other valuable considerations to him in hand paid, the receipt of which is hereby acknowledged, does hereby

Grant to P. A. Gillespie all that real property situated in the City of Santa Monica, County of Los Angeles, State of California, described as follows:

Lots "V", "W" and "X" in Block One Hundred Forty-eight (148) as per map recorded in Book 39, Page 45, et. sec., Miscellaneous Records of said County.

Subject to: Taxes, Conditions, restrictions, reservations and rights of way of record.

Street Bonds of Record.

To Have and to Hold to the said grantee, his heirs or assigns.

Witness our hand this 25th day of June, 1932.

V. R. IRVIN & EDNA E. IRVIN,

M. C. SMITH & MARJORIE V. SMITH

P. A. GILLESPIE MARGUERITE

GILLESPIE

MAUDE GILLESPIE

(Deposition of Mrs. Maud Gillespie.)

State of California

County of Los Angeles—ss.

On this 28th day of June A. D., 1932, before me a Notary Public in and for said County, personally appeared V. R. Irvin, Edna E. Irvin, M. C. Smith and Marjorie V. Smith, known to me to be the persons whose names are subscribed to the within Instrument, and acknowledged that they executed the same.

Witness my hand and official seal.

[Seal] T. O. McCOY

Notary Public in and for said County and State.

My Commission Expires January 14, 1933.

State of California

County of Los Angeles—ss.

On this 29th day of June, A. D., 1932, before me, Frances L. Crofts, a Notary Public in and for said County and State, personally appeared Maude Gillespie, known to me (or proved to me on the oath of), to be the person whose name is subscribed to the within Instrument, and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

FRANCES L. CROFTS

Notary Public in and for said County and State.

(Deposition of Mrs. Maud Gillespie.)

State of Oklahoma,

County of Tulsa—ss.

Before me, the undersigned Notary Public, in and for said County and State, on this 25th day of June, 1932, personally appeared P. A. Gillespie and Marguerite Gillespie, his wife, personally known to me to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

RUTH REYNOLDS,

Notary Public.

My commission expires April 14, 1934. [91]

Escrow No. 779

Order No.

When recorded, please mail to P. A. Gillespie, 602 National Bank of Commerce Bldg, Tulsa, Okla.

Recorded June 29, 1932. [90]

Mr. Rorschach: And it is hereby stipulated and agreed by and between respective counsel of record that the foregoing exhibits of the Petitioner, numbered from one to four, may be withdrawn and retained in the custody of Petitioner's counsel, subject to being produced at the trial of this case at Oklahoma City, Oklahoma, on or after May 13, 1940.

(Deposition of Mrs. Maud Gillespie.)

Mr. Taylor: So stipulated.

(S)

MAUD GILLESPIE

(Signature of the witness)

Subscribed and sworn to before me this 29th day of April, 1940.

(Seal)

(S) C. N. OLSON

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: U.S.B.T.A. Filed May 1, 1940. [82]

[Title of Board and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto and by and between their respective counsel that the following facts should be taken as true. This stipulation is entered into without prejudice to the right of either party to offer and introduce further evidence not inconsistent with the facts herein stipulated to be taken as true.

I.

Mrs. Maud Gillespie and F. A. Gillespie, husband and wife, conveyed to F. A. Gillespie & Sons Company on May 15, 1929, pursuant to a contract entered into between F. A. Gillespie and Maud Gillespie and F. A. Gillespie & Sons Company, dated the 15th day of May, 1929, copy of which agreement is set out and attached to petitioner's petition and

(Deposition of Mrs. Maud Gillespie.)

marked Exhibit "D", the following property which had a fair market value as of May 15, 1929, of not less than the amounts set out below: [92]

Item	Amount
U. S. First Liberty Loan Bonds and Port of New Orleans, Louisiana State Bonds	\$1,172,000.00
Empress Building, Tulsa, Oklahoma	150,000.00
Sundry lands and lots located in Oklahoma	22,512.00
Cash and Accounts Receivable.....	94,365.22
Sundry Stocks	25,363.00
Total	\$1,464,240.22

The cost of the above property to F. A. Gillespie and Maud Gillespie equalled or exceeded the above fair market value.

II.

Maud Gillespie was born June 9, 1872. F. A. Gillespie was born August 22, 1868.

An annuity could have been purchased from a reputable life insurance company doing business in the United States on the 15th day of May, 1929, upon the life of a male individual born in the United States on August 22, 1868, which would have paid \$15,000 per annum to said male individual for his life for the sum of \$153,750.

An annuity could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$15,000 per annum to said female individual for her life for the sum of \$196,537.50. An annuity could have been purchased [93] from a reputable life insurance company doing business in the United States on May 15, 1929, upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$20,000 per annum to said female individual for her life for the sum of \$262,050. An annuity could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$25,000 per annum to said female individual for her life for the sum of \$327,562.50.

HAROLD E. RORSCHACH

Counsel for Petitioner

J. P. WENCHEL

JLB

Counsel for Respondent.

[Endorsed]: U.S.B.T.A. Filed May 16, 1940. [94]

[Title of Board and Cause.]

REPORTER'S MINUTES

Hearing at Oklahoma City, Okla., on the 16th day of May, 1940, at 3:15 p. m.

The above-entitled proceeding came on for hearing on Thursday, the 16th day of May, 1940, before the Honorable Samuel B. Hill, Member of the United States Board of Tax Appeals, at Oklahoma City, Okla., pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had and testimony heard, to-wit:

APPEARANCES:

Harold E. Rorschach, Esq., 529 McBirney Building, Tulsa, Okla., appearing on behalf of Petitioner.

Stanley B. Anderson, Esq. (Hon. J. P. Wenchel [97] Chief Counsel, Bureau of Internal Revenue), 810 First National Building, Oklahoma City, Okla., appearing on behalf of Commissioner of Internal Revenue, Respondent. [98]

Proceedings

The Clerk: Docket No. 98770. Maud Gillespie.

The Member: Announce your appearances for the record, please.

Mr. Rorschach: Harold E. Rorschach, for the petitioner.

Mr. Anderson: S. B. Anderson, for respondent.

The Member: State the case for the petitioner.

STATEMENT OF CASE ON BEHALF OF
PETITIONER:

By Mr. Rorschach:

Mr. Rorschach: Your Honor, in this case the Commissioner of Internal Revenue has sought to include the sum of \$17,666.25 in the income of the taxpayer, Maud Gillespie, for the calendar year 1935, on the ground that this sum is entirely taxable as an annuity growing out of a certain contract of May 15, 1929.

It is the petitioner's contention, first, that the taxpayer received a sum of \$15,000 and the sum of \$2,666.25 in the nature of a loan.

Next, it is the petitioner's contention that no amount of this sum, at any rate, was taxable, for three reasons:

"First, it is in payment of the acquisition of property, which, as a cash cost of the taxpayer, was in excess of the amount received up to and including the year 1935.

The Commissioner has contended that this payment is in the nature of an annuity and under the applicable Revenue Act that three percent of the purchase price or the cost of an annuity is taxable. The purchase price being in excess of a million dollars, the Commissioner contends that it is all taxable.

The petitioner contends that if the Commissioner is correct, that it is an annuity, then section 22 of the Revenue Act as pertains to annuities is unconstitutional—void, as pertains to the petitioner in this case.

The Member: I did not understand what you said the Commissioner contends. Will you repeat that?

Mr. Rorschach. The Commissioner has contended that this sum, \$17,666.25, is in the nature of an annuity paid by F. A. Gillespie & Sons Company to the taxpayer, Maud Gillespie.

The applicable statute of 1935 provides that an annuity is to be taxed on the basis of 3 percent of the cost, if Your Honor recalls that section of the statute.

The Commissioner, then, proceeds with his calculation and says the cost of the annuity was in excess of a million dollars, and 3 percent of that, of course, would be \$30,000, and that is in excess of the \$17,666.25; therefore, it is all taxable.

We do not admit that it is an annuity, but if it is an annuity our position is, then, the taxing on that basis by the Commissioner would, in effect, invalidate that portion [100] of section 22 for the reason that it would be an unconstitutional taking of the taxpayer's property, not within the purview of the sixteenth amendment. The sixteenth amendment only proposes to levy a tax on income, or permit the levy of a tax on income.

But petitioner contends that if it is an annuity, then it can be taxable only—assuming that section 22 is constitutional, then the taxpayer can only be taxed upon what an annuity would have cost at the date this contract was entered into, to wit: May 15, 1929, and taxed upon 3 percent of what that annuity would have cost, and that would amount to about

\$9,000 a year of this \$15,000 a year annual payment.

This annual payment grows out of a contract which will be placed in evidence. This contract was entered into between Mrs. Maud Gillespie and Mr. F. A. Gillespie May 15, 1929, in favor of F. A. Gillespie & Sons Company, an Oklahoma corporation, and these payments are made as a result of that contract. Annual payments, or annual sums, payable monthly, are paid as a result of this contract. And it is upon that sum that the Commissioner is seeking to increase the taxpayer's taxable income and thereby increase the tax.

First, we say it is a mere purchase of assets.

Denying that, then we say if the Commissioner is attempting to tax all of this amount as an annuity, then it is, in effect—— We do not say that section 22 is [101] unconstitutional generally, but we say in this effect it must be unconstitutional.

The Member: Any statement on behalf of the respondent?

Mr. Anderson: I believe the petitioner has correctly stated the issues, Your Honor.

Mr. Rorschach: There is a stipulation of facts which we would like to submit; I mean, a deposition and stipulation of facts.

The Member: The deposition will be received as evidence.

Mr. Anderson: Also, the cross-examination?

The Member: With the cross-examination included.

Mr. Rorschach: This was taken at Beverly Hills, Calif., April 27, 1940.

Now, we have a stipulation of facts here which stipulate a portion of the facts in this case, and I would like to enter that at this time.

The Member: The stipulation of facts will be received in evidence.

Mr. Rorschach: Now, after the time of the taking of this deposition in California it was stipulated by and between the respective counsel that exhibits Nos. 1, 2, 3, and 4, which were placed in evidence along with the deposition, might be retained by petitioner's counsel and produced at this hearing.

I now have the exhibits, Nos. 1, 2, 3, and 5, and I ask [102] leave of Your Honor to substitute photostatic copies of these exhibits, being four deeds from the records of the petitioner.

The Member: They are already in evidence with the deposition.

Mr. Rorschach: Yes.

The Member: There is no objection to the photostatic copies, I take it?

Mr. Anderson: No.

The Member: You may have the privilege of substituting photostatic copies for the exhibits named.

Mr. Anderson: There are some objections in this deposition.

The Member: Off the record.

(Thereupon the objections contained in the deposition were discussed and ruled upon off the record.)

The Member: I will say this for the record, that I have indicated rulings on certain objections and motions in the deposition of Charles D. Green and Maud Gillespie, in evidence in this proceeding, and reserve rulings on all objections and motions made in connection with such depositions as to which no such ruling is indicated in the deposition.

Mr. Rorschach: And in the event any motions—

The Member: Exceptions will be allowed to the party against whom the ruling is made. [103]

Mr. Rorschach: Mr. Murphy.

EVIDENCE ON BEHALF OF PETITIONER:

Thereupon, the petitioner, to maintain the averments of her petition, introduced the following proof.

A. N. MURPHY,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rorschach:

Q. Will you state your name?

A. A. N. Murphy.

Q. Are you an officer of a bank?

A. I am.

Q. Of what bank are you an officer?

A. First National Bank & Trust Company of Oklahoma City.

(Testimony of A. N. Murphy.)

Q. What office do you hold with the First National Bank & Trust Company?

A. Assistant trust officer.

Q. As an officer of the First National Bank & Trust Company have you had up for your consideration and the consideration of your discount committee loans secured by agreements covering deferred agreements for the purchase of personal property, real property, and oil and gas property, [104] in the State of Oklahoma? A. I have.

Q. I hand you an agreement dated the 15th of May 1929, which is exhibit D attached to the petitioner's petition, and ask you to examine same and state if similar agreements have been tendered to you, on behalf of your bank, evidencing the right of the grantor to receive income similar to this agreement. A. They have.

Q. I ask you again to refer to the agreement which is attached to the petitioner's petition, and marked exhibit D, dated May 15, 1929, and ask you if you have an opinion as to whether or not your bank would make a loan to either F. A. Gillespie or Maud Gillespie, taking as collateral for the loan an assignment of the payments to be made to either F. A. Gillespie or Maud Gillespie.

Mr. Anderson: I object.

The Member: I think you are restricting it too much there. One bank might be willing to, and another bank might not be willing to.

(Testimony of A. N. Murphy.)

Mr. Anderson: I will object on the other ground that it is immaterial.

The Member: I do not know whether it is or not. I will overrule the objection on that ground.

By Mr. Rorschach: [105]

Q. Will you state whether you have an opinion as to whether your bank or any other commercial bank would or would not make a loan——

Mr. Anderson (Interrupting). I object to that, Your Honor, as to his stating his opinion of what another bank would do.

The Member: What I had in mind was whether, as a banker, his experience, if any, gives him an opinion in the nature of an expert opinion as to whether such commercial paper would be deemed by the bank as collateral.

Mr. Anderson: I object, Your Honor. He has not been qualified to give an expert opinion.

Mr. Rorschach: He stated he was assistant trust officer of the First National Bank & Trust Company and has taken up matters similar to this contract with the discount committee of his bank, and identified the contract, and stated he examined a contract similar to this contract.

Of course, I will admit, Your Honor, some bankers may not be qualified, but I believe, Your Honor, most bankers generally are conceded to be.

The Member: That seems to be the point, whether his own bank would recognize it as a basis for loans.

(Testimony of A. N. Murphy.)

By Mr. Rorschach:

Q. Let me ask you, Mr. Murphy: How long have you been with the First National Bank & Trust Company of [106] Oklahoma City?

A. More than 10 years.

Q. In the last 10 years have you discussed contracts of this nature with national bank examiners and examiners for the Federal Deposit Insurance Corporation? A. I have.

Q. Have you an opinion, then, as to whether or not a so-called commercial loan could be based upon such a contract as this? That is, could such a contract be considered by a commercial bank as collateral security for a loan?

A. I have such opinion.

Q. Will you state what that opinion is?

A. It would have no value for a commercial loan, not only in the bank I am associated with but other banks in this section of the country.

Q. Will you state the reason for that opinion?

A. It has no set value. It is speculative, because the payments of money provided there cease upon the death of the party.

Mr. Anderson: Just a minute. I would like the record to show, Your Honor, I am objecting to all this line of testimony as being immaterial.

The Member: Objection overruled. Exception allowed.

The Witness: I might say, further, I am satisfied that if they did make such a loan the national

(Testimony of A. N. Murphy.)

bank examiners [107] would require them to charge it off.

Mr. Anderson: I move that that be stricken as hearsay.

The Member: I think it is within the scope of his qualifications. I will overrule the objection. He is stating his own opinion. He is not giving it as hearsay.

By Mr. Rorschach:

Q. Referring again to the agreement dated May 15, 1929, and marked exhibit D, and attached to the petitioner's petition, I ask you if this is an unusual form of agreement.

Mr. Anderson: Objected to as immaterial, Your Honor, whether the agreement is a usual or unusual agreement. We have an agreement.

The Member: I will sustain the objection.

By Mr. Rorschach:

Q. Have you had experience with any other agreements similar to the agreement dated May 15, 1929, and marked exhibit D, and attached to the petitioner's petition?

Mr. Anderson: That is objected to as immaterial. The proper foundation has not been laid.

The Member: Objection overruled.

A. I have.

By Mr. Rorschach:

Q. What experience have you had with other agreements of a similar character, covering the

(Testimony of A. N. Murphy.)

sale of personal property and oil properties in the State of Oklahoma? [108]

Mr. Anderson: Objected to as immaterial.

The Member: Objection overruled.

A. They have been up in our discount department through matters of applications for loans. We have handled quite a few in our trust department, sometimes involved in a trust and sometimes in an escrow.

Those are the direct experiences I have had with such matters.

Q. Do you know of any bank or financial house that makes a business of buying annuities?

A. I do not.

Q. As far as you know, do annuities have a market value?

A. I don't believe they have.

Q. Has your bank ever made a loan, as far as you know, taking an annuity or an assignment of an annuity income as security?

Mr. Anderson: Objected to as immaterial, Your Honor, all of this line of questioning.

The Member: What is the idea of this?

Mr. Rorschach: We are trying to show, Your Honor—The Government has contended this contract is an annuity contract, and we are trying to show that it has no value if it is an annuity contract, which we say it isn't, but the Government says it is. [109]

(Testimony of A. N. Murphy.)

The Member: That it has no asset value for security? Is that what you are trying to show?

Mr. Rorschach: We are trying to show that it has no asset value and no loan value.

The Member: I will overrule the objection, then.

Mr. Rorschach: Read the question, please.

(Thereupon the last question was read by the reporter as recorded.)

A. None, to my knowledge. I believe if it had, it would have been called to my attention.

Mr. Rorschach: That is all.

Mr. Anderson: No questions.

Witness excused.

Mr. Rorschach: Miss Reynolds, please.

RUTH REYNOLDS,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rorschach:

Q. Will you state your name, please?

A. Ruth Reynolds.

Q. Where do you live?

A. Tulsa, Okla.

Q. What position do you hold with F. A. Gillespie [110] & Sons Company?

(Testimony of Ruth Reynolds.)

A. Assistant secretary.

Q. As such assistant secretary do you have charge of the books and records of F. A. Gillespie & Sons Company? A. I do.

Q. How long have you been employed and been associated with F. A. Gillespie & Sons Company?

A. Since February, 1932.

Q. I hand you an agreement of May 15, 1929, which is attached to the petitioner's petition, marked exhibit D, and ask you if F. A. Gillespie & Sons Company received the property from F. A. Gillespie and Maud Gillespie as set out in the agreement?

A. Yes. F. A. Gillespie and Maud Gillespie turned over Government and State bonds, and real estate in California and Oklahoma, in excess of one million dollars.

Q. I hand you exhibit No. 1, which is attached to the deposition previously admitted in evidence, and ask you what it is?

A. This is a deed covering the Empress property in Tulsa, on which the Kress Company now has a building.

Q. Is it leased to the Kress Company?

A. Yes, it is.

Q. For a term of years?

A. It is leased for a term of years, at an annual [111] rental of \$12,000.

Q. Is that the Empress Building?

(Testimony of Ruth Reynolds.)

A. It is the Empress Building property on which the Kress Company now has their own building.

Q. I hand you exhibit No. 3, previously attached to the deposition, and ask you to state what property it covers.

A. This covers the transfer of F. A. Gillespie & Sons Company of our line plant land, which is 550 acres in Johnston County, Oklahoma.

Q. I hand you exhibit No. 2, which has previously been attached to the deposition, and ask you what it covers?

A. This covers the transfer to the corporation of the Gillespie residence property in Tulsa.

Q. Located in Tulsa County, Oklahoma?

A. That is right.

Q. I hand you exhibit No. 4, which has previously been attached to the deposition and heretofore admitted, and ask you to state what it is.

A. This transfers the interest owned by Maud Gillespie and others in a certain three blocks in Santa Monica, Calif.

Q. To whom?

A. To P. A. Gillespie.

Q. In this exhibit No. 4 you will note the name P. A. Gillespie. Who is P. A. Gillespie? [112]

A. P. A. Gillespie is Vice President of F. A. Gillespie & Sons Company, and the deed was taken in his name for convenience. And simultaneously he and his wife executed the deed to the corporation which was held unrecorded in the files.

(Testimony of Ruth Reynolds.)

Q. Do you have the minute book of the corporation with you? A. I do.

Q. Will you turn to the Minutes of the directors' meeting held February 18, 1932, and read the minutes of that meeting from the minute book?

A. "Minutes of a special meeting of the directors of F. A. Gillespie & Sons Company, held at the office of the company, National Bank of Commerce Building, Tulsa, Okla., February 18, 1932, at 10:30 o'clock a.m.

"The meeting was called to order by F. A. Gillespie, the president, and he presided until it adjourned.

"In the absence of the secretary, Pearl Kimble, the assistant secretary, performed the duties of her office until the close of the meeting.

"The books of the company were produced, examined, and read, and it was shown that the following were the directors of the company: F. A. Gillespie, Maid Gillespie, and Palmer A. Gillespie.

"The assistant secretary read the call and waiver of [113] notice for the meeting. It is as follows:

"Call and waiver of notice.

"A special meeting of the directors of P. A. Gillespie & Sons Company will be held at the office of the company, National Bank of Commerce Building, Tulsa, Okla., on February

(Testimony of Ruth Reynolds.)

18, 1932, at 10:30 o'clock a.m. This meeting is held for the purpose of transacting of business which may come before the meeting. Dated February 17, 1932. F. A. Gillespie, President. The undersigned, being all directors of F. A. Gillespie & Sons Company, hereby waive any and all requirements as to the notice of the time, place, and purpose of the above referred to meeting and consent to the holding thereof, and specifically consent to the transaction there of all business which may come before the meeting.

“Dated February 18, 1932.

“Signed, F. A. Gillespie, Maud Gillespie, Palmer A. Gillespie.

“The secretary called the roll of directors and the following directors answered ‘present’:

“F. A. Gillespie and Palmer A. Gillespie.

“The president announced that all of the directors, having waived in writing, the time, place, and purpose of the meeting, and the majority of the directors being present, the meeting was competent to transact such business as might come before it. [114]

“The assistant secretary stated that on May 15, 1929, the corporation had entered into a contract with F. A. Gillespie, which contract was executed by the president, and the corporate seal thereon attested by the secretary, and that since that time all of the parties to

(Testimony of Ruth Reynolds.)

the contract had been acting thereunder, and that some of the parties to the contract believed it would be beneficial to all parties to have the contract ratified and approved by all directors.

“The following resolution was offered, and the motion unanimously adopted:

“Whereas this company, acting through its president and secretary, has heretofore entered into a contract, dated May 15, 1929, by and between F. A. Gillespie, Maud Gillespie, and F. A. Gillespie & Sons Company, and

“Whereas the acquisition by this company of the properties and assets referred to in said contract are of great value and largely in excess of the amounts provided to be paid under the terms of said contract by this corporation, now, therefore, be it resolved that the action of the president and secretary of this corporation in executing and delivering said contract be and the same is hereby ratified, approved, and confirmed.

“Be it further resolved that the execution and delivery of said contract by the president and the secretary of this corporation be and the same is hereby declared to be the [115] corporate act and deed of this company, and binding upon it.

“The assistant secretary stated the company had received letters from Mr. F. A. Gillespie

(Testimony of Ruth Reynolds.)

in reference to interest in certain lands and in reference to certificates for 23,800 shares of the capital stock of the Gillespie Land & Irrigation Company, and in reference to other stocks and bonds, and had also received special warranty deeds conveying certain lands in the city of Tulsa, which deeds were signed by F. A. Gillespie and Maud Gillespie, for the purpose of carrying out the obligations of F. A. Gillespie under the terms of the contract.

“And it appearing to the directors that said F. A. Gillespie has heretofore delivered and transferred to the corporation all other property mentioned in the contract of May 15, 1929, the following resolution was offered and, on motion, unanimously adopted:

“Resolved that the company accept the above referred to letters and deeds from F. A. Gillespie, which together with the stocks and bonds and other securities heretofore transferred and delivered to this corporation by the said F. A. Gillespie, are in full compliance with the obligations of F. A. Gillespie to be performed under the terms of the contract dated May 15, 1929, and the company acknowledges receipt in full of all of the property referred to in said contract and therein conveyed and assigned or to be conveyed [116] and assigned by the said F. A. Gillespie.

(Testimony of Ruth Reynolds.)

“On motion made, seconded, and carried, the secretary was instructed to incorporate in this minute book immediately following minutes of this meeting copies of the above referred to letters.”

The Member: What is this, now?

Mr. Rorschach: The minutes ratifying or approving the contracts here in question.

The Member: What is this following?

Mr. Rorschach: This is the ratification of that contract. This whole meeting has to do with the ratification of that agreement.

The Member: That should have been offered as an exhibit instead of going into the record.

Mr. Anderson: I will stipulate that F. A. Gillespie & Sons ratified this contract, in order to save time.

Mr. Rorschach: I want the entire minutes to go in. If you want to stipulate them, we will furnish a copy of the minutes.

The Member: I do not like to have to put all of this in the record. It would be in the record just the same if it were an exhibit.

Go ahead and read it.

The Witness (Continuing):

“The matter of the litigation between Maud Gillespie, F. A. Gillespie, and [117] F. A. Gillespie & Sons Company now pending in the District Court of Tulsa County, Oklahoma.

(Testimony of Ruth Reynolds.)

was then discussed. The president stated a compromise settlement had been effected with the plaintiff whereby it was agreed that Maud Gillespie was indebted to the company in the sum of \$17,845.05, less an amount consisting of payments maturing and actually paid by Mrs. Gillespie, taxes, interest, and so forth, since May 15, 1929, on the so-called Santa Monica properties, which amount had not as yet been definitely determined, and that, under the terms of the agreement, this amount was to be determined and to be deducted from the above sum of \$17,845.05, and that one-half of that amount was then to be paid to Mrs. Gillespie by the company out of the payment of \$10,000 which would become due from the company to Mrs. Gillespie on May 15, 1932, or the company could deduct that amount from that company.

“The company, it was agreed and admitted, had owed Mrs. Gillespie, on account of monthly payments, the sum of \$10,000, and that under an order of Court Mrs. Gillespie had received \$2,000, and her attorney had received \$2,000, making a total of \$4,000, leaving a balance of \$6,000 due Mrs. Gillespie on account of monthly payments provided under the contract, and this sum of \$6,000 was to be immediately paid to Mrs. Gillespie, and that Maud Gillespie was to acknowledge in writing that she held such interest in the Santa Monica property as

(Testimony of Ruth Reynolds.)

she held on May 15, 1929, as trustee for this [118] company, and that she would at any time, upon request of the company, transfer and convey the same to such person or persons as the company might nominate, the consideration for the transfer, of course, to be paid to this company.

“All of the directors at the meeting expressed themselves as being fully advised of the proposed compromise settlement.

“The following resolution was offered and, on motion, unanimously adopted:

“Resolved: That the proposed compromise settlement with Maud Gillespie in the litigation now pending in the District Court of Tulsa, County, Oklahoma, as outlined by the president’s statement, be and the same is hereby ratified, approved, and confirmed, and the proper officers of this corporation are directed to pay Maud Gillespie the sum of \$6,000 immediately upon the approved journal entries of judgment having been filed by the Judge.

“There being no further business, the meeting, on motion, adjourned.

“Signed F. A. GILLESPIE,

President.

PEARL KIMBLE,

Secretary.

“Approved by P. A. Gillespie.”

(Testimony of Ruth Reynolds.)

Q. Will you again refer to your minute books and ascertain if you have a letter as to the contract of Maud Gillespie?

The Member: How long is that? [119]

Mr. Rorschach: I am going to offer this in evidence, Your Honor.

This is part of the minutes, Your Honor. Would it be permissible to submit a photostatic copy of this?

The Member: Yes. There is no objection to the photostatic copy, is there?

Mr. Anderson: No objection, Your Honor.

The Member: Admitted as petitioner's exhibit No. 1.

(The said letter, so offered and received in evidence, was marked "Petitioner's Exhibit No. 1" and made a part of this record.)

PETITIONER'S EXHIBIT NO. 1

Tulsa, Oklahoma

November 16, 1933

F. A. Gillespie and Sons Company

Tulsa, Oklahoma

Gentlemen:

Under the terms of a certain Agreement entered into under date of May 15, 1929, between F. A. Gillespie, F. A. Gillespie and Sons Company and myself, the company is obligated to pay me a cash dividend of \$10,000.00 per year—or in lieu of a declared dividend, to pay me an equal sum in cash.

(Testimony of Ruth Reynolds.)

Since I realize the company is not at this time financially able to continue these payments, I offer you the following proposition.

I agree to allow suspension of such dividend payment of \$10,000.00 per year, to be resumed upon the company becoming financially able to resume payment, provided F. A. Gillespie will suspend a like amount from funds he now draws from the company; such suspended funds to be used for the development of the company. Provided further, that F. A. Gillespie pay to me one-half of the net refund on federal taxes received by him in December, 1932 (by net refund, meaning total amount received, less payments made in settlement of suit and for fees and commissions).

My agreement of suspension of dividend payments is contingent primarily upon receipt of this money from F. A. Gillespie. I am the owner of a building in Los Angeles that has a second mortgage of approximately \$15,000.00 which has to be reduced at the rate of approximately \$2,500.00 semi-annually. There is also a first mortgage of \$75,000.00 on the building. If I receive funds referred to from F. A. Gillespie, the second mortgage will be paid in full and the income from the property will then take care of interest and principal payments on the first mortgage, thus enabling me to allow suspension of dividend payments from the company.

This letter is not to be construed to imply that I am waiving my right for all time to future divi-

(Testimony of Ruth Reynolds.)

dends and after three years, if I should so wish, I may demand these payments be continued as set out in the original contract.

Trusting this proposition will prove acceptable to the parties concerned, I am

Very truly yours,

MAUD GILLESPIE.

[131]

By Mr. Rorschach:

Q. Now, will you refer to the books and records you have with you and tell the member of this board the amount which has been paid to F. A. Gillespie for the year 1929, down to December 31, 1935, under the terms of the agreement of May 15, 1929, attached to petitioner's petition as exhibit D?

Mr. Anderson: Objected to as immaterial.

Mr. Rorschach: I think that is material for the reason that we allege in our petition the amount of money that has been paid under the terms of this contract, and if this is termed a taxable asset that is material.

The Member: Objection overruled.

Mr. Anderson: Exception. [120]

The Member: Exception allowed.

Is that some more minutes you are going to read?

Mr. Rorschach: No.

The Witness: The records of the company, of which I have a condensation here, show that in 1932 there passed through F. A. Gillespie's account the total sum of \$39,375. Of that amount——

(Testimony of Ruth Reynolds.)

Mr. Anderson (Interrupting): Just a minute. Where are those figures taken from?

Mr. Rorschach: Just a minute Mr. Anderson.

Just proceed with the reading of your information there.

Mr. Anderson: Just a minute. I want to see where this information comes from. These are sheets of paper.

Mr. Rorschach: She is testifying from the books and records of the company.

By Mr. Anderson:

Q. Are these sheets part of the books and records?

A. These sheets are in my handwriting and represent a condensation of the books and records of the company.

By Mr. Rorschach:

Q. Those are from the books and records you have here in your possession? A. Yes, sir.

Mr. Anderson: I would like to see the books. The books are the best evidence. [121]

Mr. Rorschach: Your Honor, we have the books here.

The Member: Well, show them to him.

The Witness: This (referring to books) is the account of 1932, of F. A. Gillespie, which has an opening entry of a credit, which is substantiated by this audit report, unpaid salary due from F. A. Gillespie & Sons Company to F. A. Gillespie—

Mr. Anderson (Interrupting): Just a minute. The only thing I am interested in is the payments made by Gillespie & Sons to Mr. Gillespie pursuant to this contract.

The Witness: In 1932 his account was adjusted for the years 1929, 1930, and 1931, which this account represents. Then, in the year 1932, 1933, 1934, and 1935 he was paid \$15,000 a year under the contract, with the exception of this account (indicating), and I can explain the addition there.

But this account in 1932 represents, necessarily, adjustments made in previous years not paid for.

By Mr. Anderson:

Q. How much, actually, was he paid in 1932?

A. He was actually paid an amount of \$39,375, under the contract.

Q. Does that represent adjustments made of payments—That includes payments that were not made in prior years?

A. That represents amounts paid to him, under this contract, for the year 1929, after May 15, and for the years [122] 1930 and 1931.

Q. What do the figures on this sheet represent? Do they represent the payments actually made to Mr. and Mrs. Gillespie?

A. Just to Mr. Gillespie.

Q. Do they represent the net payments made after adjustments were made?

A. The figures I have represent the net payments to Mr. F. A. Gillespie, under the terms of the contract.

(Testimony of Ruth Reynolds.)

Q. And those figures are taken from the books?

A. That is right.

Mr. Anderson: I have no objection to your testifying to them.

By Mr. Rorschach:

Q. Then Miss Reynolds, will you state the amounts of money paid by F. A. Gillespie & Sons Company to F. A. Gillespie from the year 1929 to December 31, 1935, under the terms of this agreement of May 15, 1929, which is attached to the petitioner's petition as exhibit D.?

A. In the year 1932 Mr. F. A. Gillespie was paid \$39,375, which represented the amounts due him under the contract——

Mr. Anderson (Interrupting): Just a minute. The contract speaks for itself. I move that the answer be stricken and limited to amounts actually paid. [123]

Mr. Rorschach: That is what she is trying to testify to. You have interrupted her so many times——

By Mr. Rorschach:

Q. Under that contract this amount of money was paid?

Mr. Anderson: He was entitled to receive an annuity of \$15,000, under the contract; is that right?

Mr. Rorschach: I am asking Miss Reynolds to testify to what the company paid.

(Testimony of Ruth Reynolds.)

The Member: The objection interposed was to the statement that the money was paid under the contract.

By Mr. Rorschach:

Q. Will you state, Miss Reynolds, what the company paid to Mr. F. A. Gillespie in 1932 by virtue of the terms of the contract of May 15, 1929?

Mr. Anderson: Now, I'll object to that, if the answer is going to be the same.

The Member: Was anything paid to him except by virtue of the contract?

Mr. Rorschach: Your Honor, there were other payments made to him in the year 1939 by virtue of the amount he was entitled to for the year 1932.

Mr. Anderson: Well, let the witness explain what these other payments represent, then.

Mr. Rorschach: Well, we will have to let the witness testify, then. [124]

The Member: I will overrule the objection.

Go ahead.

The Witness: In the year 1932 Mr. F. A. Gillespie was paid \$39,375. That amount represented \$9,375 due for the year 1929, \$15,000 due him for the year 1930, and \$15,000 due him for the year 1931. Also, in the year 1932 he was paid \$15,000, for the year 1932; and then, was paid \$15,000 for each of the years, 1933, 1934, and 1935.

By Mr. Rorschach:

Q. Now, will you refer to the books and records and tell the Member of this Board the amount paid

(Testimony of Ruth Reynolds.)

to Maud Gillespie from the year 1929 to December 31, 1939, under the terms of the agreement of May 15, 1929, which is attached to petitioner's petition as exhibit D?

A. In 1932 Mrs. Maud Gillespie received the sum of \$19,500. She also received an additional sum of \$15,394.01. Those were adjustments on the amounts due her from the time the contract was made, in May, 1929, for the balance of 1929, and for 1930 and 1931.

In 1933 she was paid \$25,000.

In 1934 she was paid \$20,000; \$15,000 under the contract, and \$5,000 which was an adjustment on the 1932 payment.

In 1935 she received \$17,666.25. \$15,000 of that was paid on the contract, and \$2,666.25 was in the nature of a [125] loan to Mrs. Gillespie to pay off some obligation.

In 1936 she received \$19,000, of which \$15,000 was payment under the contract, and \$4,000 was a loan to retire an obligation.

In 1937 she received \$15,000.

In 1938 she received \$15,000.

In 1939 she received \$15,000.

Q. As assistant secretary of the company do you have custody of the stock book of F. A. Gillespie & Sons Company? A. Yes, sir.

Q. Will you refer to that stock book and state the stockholders to whom the stock of F. A. Gillespie & Sons Company was issued and outstanding,

(Testimony of Ruth Reynolds.)

and the amounts issued and outstanding, as of May 15, 1929?

A. There were 13 stock certificates of F. A. Gillespie & Sons Company that might be issued.

No. 1 is canceled. No. 2 was issued to Maud Gillespie for 5 shares. No. 3 was issued to B. A. Gillespie for 5 shares. No. 4 was issued to L. A. Gillespie for 5 shares. No. 5 was canceled. No. 6 was issued to F. A. Gillespie for 5 shares. Nos. 7, 8, 9, 10, and 11 were canceled. No. 12 was issued to F. A. Gillespie, Trustee for F. A. Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie, P. A. Gillespie, for 9,975 shares.

Certificate No. 13 was issued to P. A. Gillespie for [126] 5 shares.

Making a total number of shares outstanding of 10,000.

Q. I now hand you exhibit B, attached to petitioner's petition, being a declaration of trust, dated February 9, 1921, and ask you if the stock issued in the name of F. A. Gillespie, Trustee, in the amount of 9,975 shares is the stock held by F. A. Gillespie under said declaration of trust? A. It is.

Mr. Rorschach: I have here the articles of incorporation of F. A. Gillespie & Sons Company, of Tulsa, Okla., certified by the Secretary of State of the State of Oklahoma, which I desire to offer in evidence at this time.

Mr. Anderson: No objection.

(Testimony of Ruth Reynolds.)

The Member: Admitted as petitioner's exhibit No. 2.

(The said articles of incorporation, so offered and received in evidence, were marked "Petitioner's Exhibit No. 2" and made a part of this record.)

PETITIONER'S EXHIBIT NO. 2

State of Oklahoma

Great Seal of the State of Oklahoma

1907

Office of Secretary of State

To all to whom these Presents Shall Come, Greeting:

I, C. C. Childers, Secretary of State of the State of Oklahoma, do hereby certify that the following and hereto attached is a true copy of Amended & Extended Articles of Incorporation of F. A. Gillespie and Sons Company, Tulsa, Oklahoma.

Filed: November 6, 1939, the original of which is now on file and a matter of record in this office.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Oklahoma City, this sixth day of November, A. D. 1939.

[Seal]

C. C. CHILDERS

Secretary of State

KATHERINE MANTON

Ass't Secretary of State.

(Testimony of Ruth Reynolds.)

AMENDED ARTICLES OF INCORPORATION
OF

F. A. GILLESPIE AND SONS COMPANY

Know All Men by These Presents:

That the undersigned, citizens of the State of Oklahoma, do hereby voluntarily associate ourselves together for the purpose of forming a private corporation under the Laws of the State of Oklahoma, and do hereby certify:

I.

That the name of this Corporation shall be F. A. Gillespie and Sons Company.

II.

That the objects and purposes for which this Corporation is formed are as follows:

To locate, purchase, lease or otherwise acquire, and sell lease and otherwise dispose of, lands containing, or believed to contain, or possibly containing, oil, gas, coal or other minerals, and all real estate necessary for the purposes of this Corporation, and to mortgage, sell and otherwise dispose of such real estate, leases or interests therein; to prospect for, and mine oil, gas, coal and other minerals; to contract for the drilling of oil and gas wells, and the digging and mining of coal and all other mining lands and property; to drill, bore, or otherwise develop and maintain oil, gas, coal and other mineral

(Testimony of Ruth Reynolds.)

property or properties, and to buy, own, lay, construct, maintain, operate or sell, lease or otherwise dispose of buildings, tanks, pipe lines, machinery, equipment, tools, reservoirs, refineries, smelters, crushers and mills necessary for the production, preservation, refining, manufacture, smelting, milling, [134] marketing and distribution of oil, gas, coal or other minerals and the products and by-products thereof; to do all kinds of mining and manufacturing, distributing of goods, wares and merchandise by land and water in any manner; to buy, sell and improve lands, as permitted by law; to build houses, structures, vessels, cars, wharves, docks, and piers; to lay, equip and construct and maintain pipe lines; to erect and operate telegraph and telephone lines and lines for conducting electricity in connection with the business of this Corporation; to own, buy, sell, lease and otherwise dispose of, maintain and operate filling and distributing stations, both in and out of the State of Oklahoma, and to retail and deal generally in oil and gas, coal and other minerals, and the products and by-products thereof; to enter into and carry out contracts of every kind pertaining to its business; to acquire, use, sell and grant licenses upon patent rights, and to buy, own, hold, sell and otherwise dispose of such patent rights.

To refine, market and distribute crude oil or petroleum and all of its products and by-products; to lease or otherwise acquire and sell, lease or mort-

(Testimony of Ruth Reynolds.)

gage or otherwise dispose of developed or producing oil and gas properties and the products of such oil and gas properties; to purchase, produce, refine, sell and distribute petroleum and all of the products and by-products thereof; to buy, sell or otherwise dispose of and manufacture all kinds of illuminating, burning and heating oils and gasoline, naphtha, lubricants, greases, waxes, and all other products and by-products of petroleum, and to act as agent or broker for others in all said acts.

To carry on the business of storing, drilling or prospecting for mining, producing, piping, buying and selling petroleum, natural and artificial gas, casing head gasoline, naphtha, and any and all other products or by-products thereof.

To build, construct, equip, maintain, own, control, lease or otherwise acquire, sell and dispose of, and operate [135] all necessary tanks, tank cars, pipes and pipe lines, compressors, separating plants, refineries, buildings, warehouses and the necessary fixtures and equipment thereunto belonging, and other and all means of refining, storing, saving, conveying, transporting, exporting, or marketing petroleum, oil and gas, or the crude or refined products of either, and to do all things necessary as a broker or agent in the marketing or sale of the products or by-products thereof.

To contract for, build, buy, own, lease, sell and operate all necessary mills, smelters, roads, railroads, spur tracks, tramways, loading racks, ditches,

(Testimony of Ruth Reynolds.)

flumes, pumps, pumping plants, of any kind or kinds whatsoever, and especially casing head gas plants and compressors, for the purpose of converting casing head gas into gasoline and other products, and such other property as shall be fit and necessary in carrying out the objects herein stated.

To search for, prospect and explore for ores and minerals of all kinds and character and locate mining claims, grants or lodes in the United States of America or the territories thereof, or in foreign countries, and acquire, own, work, lease, mortgage, sell and dispose of any mines, mining rights and metalliferous lands and any interest therein, and to explore work and develop the same.

To mine, quarry, work and develop mining and mineral rights; to crush, concentrate, smelt, calcine, refine, dress, amalgamate and prepare for market ores, metals and mineral substances of all kinds, and to do all other acts and things necessary or conducive to the corporations's objects, including the erection of buildings or works, and the installing of machinery and appliances of every description whenever necessary, expedient or desirable; to mortgage any mining grants, claims or lodes, mining and mineral rights, or other property belonging to this corporation and to issue bonds of the corporation whenever it may be determined so to do. [136]

To buy, sell, deal in ores and mineral plants, machinery, tools, implements, *gorceries*, provisions, clothing, boots and shoes, furnishing articles, hard-

(Testimony of Ruth Reynolds.)

ware, wooden and metallic ware, and all other articles and things in any wise required or capable of being used in connection with mining operations, and to make and manufacture such articles when required.

To construct, carry out, maintain, improve, equip, manage control or superintend any roads, ways, private railways, (private tramways, bridges, reservoirs, water courses, aqueducts, wharves) piers, docks, bulk heads, furnaces, mills, crushing, concentrating and smelting works, hydraulic works, factories, dwelling houses and warehouses; to purchase vessels and other means of transportation, except railroads other than private railroads and equip and operate the same as required for the uses and purposes of the Company, and also to do any and all other acts and things relating to mining.

To buy, purchase, lease, or otherwise acquire or build, construct, maintain and operate electric light, power and gas plants and water works, or either of them, and to build plants, lay the pipes, erect poles and construct lines, and to acquire, own, hold and sell and dispose of any and all lands and property, plants, buildings and appurtenances thereunto belonging and necessary therefor, and to do all things necessary to carry out these purposes and objects.

To acquire, so far as consistent with the Constitution and Laws of the State of Oklahoma, by purchase, subscription or otherwise, and to hold as in-

(Testimony of Ruth Reynolds.)

vestment or otherwise, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of Oklahoma, or any other State, district, Territory or Country, and to sell, assign, transfer, mortgage, pledge or otherwise dispose of the same, and, while the owner thereof, to exercise all the rights, powers and privileges of ownership. [137]

To aid in any lawful manner any corporation or association of which the bonds or other securities or evidences of indebtedness or stock are held by the Company, and to do any and all lawful acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

To acquire, own, sell or otherwise dispose of and deal in bonds, mortgages, securities, notes, commercial paper of corporations and individuals; to acquire, buy, own, sell and otherwise dispose of and deal in bonds, debentures, certificates of indebtedness and all manner and form of securities of the United States of America, of the various States of the United States of America and of the municipal sub-divisions thereof, and of all other Territories and Countries, and in any real, personal and mixed property of whatsoever kind and character permitted by the Laws of this State and of any State in which this corporation shall qualify to do business.

(Testimony of Ruth Reynolds.)

To manufacture, purchase or acquire, in any lawful manner, and to hold, own, mortgage, pledge, sell, transfer, or in any manner dispose of and deal and trade in goods, wares, merchandise and property of any and every class and description, and in any **part of the world.**

To acquire the good will, rights and property and to undertake the whole or any part of the assets or liabilities of any person, firm, association or corporation; to pay for the same in cash, the stock of this corporation, bonds or otherwise; to hold, or in any manner to dispose of the whole or any part of the property so purchased; to conduct in any lawful manner the whole or any part of any business so acquired and to exercise all the powers necessary or convenient in and about the conduct and management of such business.

To apply for, purchase or in any manner to acquire, and to hold, own, use, and operate, or to sell or in any manner dispose of, and to grant, license or otherwise give, rights in [138] respect of and in any manner deal with any and all rights, inventions, improvements, and processes used in connection with or secured under letters patent or copyrights of the United States, or any other Country, or otherwise, and to carry on any business, manufacturing or otherwise, which may be deemed to directly or indirectly effectuate these objects or any of them, in connection with the business or businesses transacted and carried on by this corporation.

(Testimony of Ruth Reynolds.)

Subject to, and not inconsistent with, the Constitution and Laws of the State of Oklahoma, to guarantee, purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock or any bonds, securities or evidences of indebtedness issued or created by any other corporation or corporations of this State, or any other State, Country, Nation or Government, and while owner of said stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon to the same extent as natural persons might or could do in connection with its said business or businesses and of any Company in a business in connection therewith.

To enter into, make and perform contracts of every kind with any person, firm, association, or corporation, municipality, body politic, Company, Territory, Government, or colony or dependency thereof, and without limit as to amount, to draw, make, accept and endorse, discount, execute and issue promissory notes, drafts, bills of exchange, warranty bonds, debentures and other negotiable instruments and evidences of indebtedness, whether secured by mortgage or otherwise, as well as to secure the same by mortgage or otherwise, so far as may be permitted by the Laws of the State of Oklahoma.

To purchase or otherwise acquire, hold and re-issue the shares of its capital stock subject to the provisions of the Laws of the State of Oklahoma.

To do any and all things herein set forth to the same extent as natural persons might or could do, and in any part of [139] the world, as principals, agents, contractors, trustees or otherwise and either alone or in company with other persons, firms, companies, associations and corporations.

III.

That the place where its principal business is to be transacted is at the City of Tulsa, State of Oklahoma, and in such other places in the State of Oklahoma and other States and Countries as the Directors may, from time to time determine, and the meetings of the Stockholders and Directors may be held at such branch office or offices thus established.

IV.

That the term for which this corporation is to exist is twenty (20) years from October 25, 1939.

V.

(a) The number of Directors of this corporation shall be three (3). The names and addresses of such of them as are now Directors and who will serve until the next election of Directors (their qualifications being that two of them are citizens and residents of the State of Oklahoma, and all and each of them are owners of capital stock of this corporation) are as follows:

(Testimony of Ruth Reynolds.)

Name	Residence
F. A. Gillespie	Tishomingo, Oklahoma
P. A. Gillespie	Tulsa, Oklahoma
L. A. Gillespie	Houston, Texas

(b) The names and addresses of the officers who are to serve until the next election of such officers are as follows:

Office Held	Name	Residence
President	F. A. Gillespie	Tishomingo, Oklahoma
Vice President	P. A. Gillespie	Tulsa, Oklahoma
Vice President	L. A. Gillespie	Houston, Texas
Secretary	B. A. Gillespie	Gila Bend, Arizona

VI.

That the amount of the authorized Capital Stock of this Corporation shall be One Million Dollars (\$1,000,000.00), and [140] shall be divided into Ten Thousand (10,000) shares of One Hundred Dollars (\$100.00) each.

This Certificate or Charter herein granted is issued subject to the following Constitutional requirement: That the Corporation to which it is issued will submit any differences it may have with its employees in reference to labor, to arbitration, as shall be provided by law.

In Witness Whereof, we, and each of us, have hereunto subscribed our names this the 25th day of October, 1939.

(Testimony of Ruth Reynolds.)

Directors

(Signed) F. A. GILLESPIE

(Signed) P. A. GILLESPIE

(Signed) L. A. GILLESPIE

Officers

(Signed) F. A. GILLESPIE

President

(Signed) P. A. GILLESPIE

Vice President

(Signed) L. A. GILLESPIE

Vice President

(Signed) B. A. GILLESPIE

Secretary [141]

State of Oklahoma

County of Tulsa—ss.

Before me, Ruth Reynolds, a Notary Public in and for said County and State, on this the 25th day of October, A. D. 1939, personally appeared F. A. Gillespie, P. A. Gillespie, L. A. Gillespie and B. A. Gillespie, to me known to be the identical and same persons who executed the within and foregoing instrument, in writing, and each for himself, acknowledged that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

[Seal] (Signed) RUTH REYNOLDS

Notary Public

My commission expires April 14, 1942. [142]

(Testimony of Ruth Reynolds.)

SECRETARY'S MEMORANDUM

Oklahoma City, State of Oklahoma
Secretary's Office

This instrument was filed for record this 6th day
of Nov. A. D. 1939 at 9 o'clock A. M.

Recorded in Corporation Record No..... at
page

C. C. CHILDERS

Secretary of State

By M. P.

\$105.00

6.00 2 C. C.

\$111.00

Del. to H. E. Rorschach, Natl. Bank of Commerce,
Tulsa, Oklo. [143]

By Mr. Rorschach:

Q. I hand you petitioner's exhibit No. 1 and
ask you to identify that, please.

A. That is a letter written by Maud Gillespie to
F. A. Gillespie & Sons Company, under date of No-
vember 16, 1933, by which she amended the pay-
ments due her under the contract of May 15, 1939.
[127]

Q. Where did that letter come from with respect
to your records?

(Testimony of Ruth Reynolds.)

A. This is a part of the minutes of the corporation.

Mr. Rorschach: That is all.

Cross-Examination

By Mr. Anderson;

Q. You stated on direct examination that Mrs. Gillespie received from Gillespie & Sons \$17,666.25 during 1935, the year at issue here, of which amount \$2,666.25 represented a loan. Does the corporation's records disclose that this amount is a loan outstanding? In other words, is it listed as a loan receivable or an account receivable on the corporation's books? A. It is not.

Q. What is the basis for your statement that this amount was a loan?

A. The information given me by Mr. P. A. Gillespie at the time the money was advanced.

Q. Who was P. A. Gillespie?

A. P. A. Gillespie is vice president, under whom I work.

Q. What did he tell you?

A. He told me Mrs. Gillespie had a note in the amount of \$2,500, and interest of \$166.25, which had to be met, and she desired the company to advance the money to pay [128] that in the nature of a loan.

Q. The corporation has no record on its books that this was a loan?

A. Except a notation in their ledger.

Q. Who made that notation? A. I did.

(Testimony of Ruth Reynolds.)

Q. Pursuant to Mr. Gillespie's instructions?

A. Yes.

Q. Did Mrs. Gillespie give a note for that loan?

A. No.

Q. Or any security? A. No.

Q. Did it provide for any interest?

A. No, sir.

Q. Did she ever pay any interest?

A. No, sir.

Q. Has the loan ever been repaid?

A. No, sir.

Q. Up to this time?

A. Not to this time.

Mr. Anderson: That is all.

Mr. Rorschach: That is all.

Witness Excused

Mr. Rorschach: Now, Your Honor, at this time we ask leave to file an amendment to our petition to conform to [129] the proof.

In the petition, I might state, for Your Honor's information, and for the benefit of Mr. Anderson, we have merely amended the amount of money alleged to have been received by Maud Gillespie up to the year 1935 to conform to the amount proved at this hearing.

Mr. Anderson: There is no objection to the amendment, Your Honor. The record shows what was actually paid.

The Member: The motion to amend is granted.

Mr. Rorschach: I don't believe that concludes the evidence, in so far as the petitioner is concerned.

The Member: Petitioner rests.

Mr. Anderson: Respondent rests, Your Honor.

The Member: The proceedings are closed, with the submission of evidence.

You may have 45 days for simultaneous briefs, and 15 days for reply briefs.

(Hearing Concluded)

[Endorsed]: U.S.B.T.A. Filed June 4, 1940.

[130]

[Title of Board and Cause.]

Docket No. 98770. Promulgated January 22, 1941.

Petitioner on May 15, 1929, agreed to transfer certain properties to the F. A. Gillespie & Sons Co., the capital stock of which was held in trust for herself, her husband, and their sons for the period of their lives, with remainder to petitioner's grandchildren. As part consideration the transferee company agreed to pay petitioner two annuities totaling \$25,000 annually. Held, the cost basis of the annuities to be used in computing the tax due under section 22 (b) (2) of the Revenue Act of 1934 is the cost of these annuities from a reputable insurance company and not the value of the transferred properties, which was in excess

of that cost. F. A. Gillespie, 38 B. T. A. 673, distinguished.

Harold E. Rorschach, Esq., for the petitioner.

Stanley B. Anderson, Esq., for the respondent.

The respondent has determined a deficiency in income tax for the calendar year 1935 in the amount of \$1,476.55, which results from his inclusion in petitioner's income of the sum of \$17,666.25 received by petitioner during the taxable year from F. A. Gillespie & Sons Co.

Questions presented are (1) whether the whole sum of \$17,666.25 should be excluded from income as a return of capital to petitioner; (2) whether that whole sum may be included in petitioner's income under section 22 (b) (2) of the Revenue Act of 1934 as an annuity and, if so, whether that section so applied is unconstitutional; (3) whether only that portion of \$17,666.25 which is not in excess of 3 percent of the fair cost on May 15, 1929, of an annuity which would produce \$25,000 annually may be included in petitioner's income; and (4) whether \$2,666.25 of the \$17,666.25 must be excluded from petitioner's income in any event as the proceeds of a loan.

Certain of the facts involved have been stipulated and are so adopted as our findings. The material portion of them is set out hereinafter with our other findings.

FINDINGS OF FACT.

Petitioner is an individual, residing at 712 North Roxbury Drive, Beverly Hills, California. She was born on June 9, 1872, and was [144] married to Frank A. Gillespie, born August 27, 1868, in 1892. They had three sons, B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie, and six grandchildren.

On April 4, 1920, F. A. Gillespie & Sons Co., a corporation, hereinafter called the company, was organized under the laws of Oklahoma, with a capital stock of \$1,000,000, divided into 10,000 shares of the par value of \$100 each. The shares were issued 9,980 to F. A. Gillespie and 5 each to petitioner and B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie. By an instrument executed on February 9, 1921, F. A. Gillespie, in consideration of the fact that equitable title to some of the properties transferred to the company for the issuance of its stock to him had theretofore been conveyed to petitioner and B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie, thereby declared that he held 9,975 of the shares of the company in trust in equal shares for the four named individuals and F. A. Gillespie. The trust term was limited to the life of the last surviving beneficiary and the corpus was made distributable among the surviving children or grandchildren of petitioner and F. A. Gillespie or among their heirs. The beneficiaries were entitled to receive currently all dividends paid on the stock and accretions thereto. On

the death of petitioner or F. A. Gillespie within the trust period, the surviving children were to become entitled to the current distributions and on their death similarly within the term of the trust this right was to pass to the grandchildren. The trustee was given broad powers of management and investment, and surviving trustees were designated.

Petitioner and F. A. Gillespie on May 15, 1929, entered into two agreements by the first of which, after reciting that they were living separate and apart and wished to settle their rights in their properties, they agreed mutually on the disposition of the property which they owned jointly and released each other reciprocally of all claims for support or inheritance. With the exception of certain personal and real property which was set aside for the contractors individually, the bulk of the property, it was agreed, was to be conveyed to the F. A. Gillespie & Sons Co. By the terms of the second agreement, which was executed by petitioner, F. A. Gillespie, and the company, the two first named conveyed to the company the following property, of the values indicated, which they owned jointly:

	Value
U. S. First Liberty Loan bonds and Port of New Orleans, Louisiana, state bonds.....	\$1,172,000.00
Empress Building, Tulsa, Oklahoma.....	150,000.00
Sundry lands and lots located in Oklahoma.....	22,512.00
Cash and accounts receivable.....	94,365.22
Sundry stocks	25,363.00
Total.....	1,464,240.22

The cost of the above property to F. A. Gillespie and petitioner equaled or exceeded the above fair market value.

As part consideration for the conveyance of these properties the company agreed to pay to F. A. Gillespie and petitioner, each respectively, the sum of \$15,000 per year for life and guaranteed to petitioner, in addition, that she should receive annually as dividends an amount equal at least to \$10,000. If funds were not available for the declaration of dividends in this amount, the company agreed to pay such sum to the petitioner. F. A. Gillespie agreed in addition that he would not sell any of the shares of the company which he held in trust without the consent of a majority of the company's directors.

The conveyances of property by petitioner to F. A. Gillespie & Sons Co. in accordance with such tripartite agreement were made for two purposes, namely, first, as a purchase of the specified annuity to herself during her life, to the extent of the fair cost thereof, and, secondly, as a gift of the excess of the value of such properties over such cost for the benefit of her children and grandchildren.

At a meeting of the board of directors of the company duly called on February 18, 1932, the contract executed by the company on May 15, 1929, under which the parties had been acting, was adopted and ratified in view of the fact that "the

acquisition by this Company of the properties and assets referred to in said contract are [sic] of great value and largely in excess of the amounts provided to be paid under the terms of said contract by this corporation." It was acknowledged by further resolution of the directors that the company had received all the properties agreed to be transferred to it under the contract.

On the same date, February 18, 1932, deeds transferring the realty identified above as the Empress Building, and the Gillespie residence in Tulsa, included above in sundry Oklahoma lands, were executed to the company. A final deed covering lands agreed to be conveyed in Oklahoma was executed on June 25, 1934.

During the year 1932 petitioner and the company became involved in certain litigation in which the company asserted a claim for debt against petitioner in the amount of \$17,845.05. This controversy was settled by the petitioner's agreement to pay the company one-half of this claim, less certain minor deductions, out of the \$10,000 which should become due to her from the company on May 15, 1932, and by the transfer to the company of certain realty in Santa Monica, California, owned by petitioner. The company agreed to pay to petitioner at once \$10,000 owed by it under the contract less \$2,000 for attorney's fees and \$2,000 already paid to petitioner.

[146]

On June 22, 1932, certain lots of real property of undetermined value owned by petitioner and lo-

cated in Santa Monica, California, were transferred to the company.

Petitioner, on November 16, 1933, in view of the depleted financial condition of the company, agreed to the suspension of the dividend payments of \$10,000 annually for three years or for such shorter period as the company was unable to make them. This agreement was made contingent on the suspension by F. A. Gillespie of his right to receive \$10,000 annually from the company, the funds thereby freed to be used in building up the concern. It was also made contingent on the payment to petitioner of one-half of the "net refund on Federal taxes" received by F. A. Gillespie in December 1932. It was stated that petitioner owned a building in Los Angeles, a \$15,000 second mortgage on which she was obligated to discharge at the rate of \$2,500 annually, and that the funds to be received from F. A. Gillespie were to be applied on this obligation.

The following payments were made under the agreement of May 15, 1929, by the company to petitioner and F. A. Gillespie on the dates indicated:

	Petitioner	Gillespie
1932.....	\$34,894.01	\$54,375
1933.....	25,000.00	15,000
1934.....	20,000.00	15,000
1935.....	17,666.25
1936.....	19,000.00
1937.....	15,000.00
1938.....	15,000.00
1939.....	15,000.00

Of the amounts paid in 1932, \$15,394.01 received by petitioner and \$39,375 received by F. A. Gillespie represent adjustments of amounts remaining due under the contract for the years 1929, 1930, and 1931.

Of the amount received by petitioner during 1935, the taxable year, \$2,666.25 is noted on the books of the company as a loan. However, petitioner did not sign a note nor give security for this amount. No interest was agreed on and up to the time of the hearing in this proceeding no payment of principal or interest had been made.

An annuity upon the life of a male individual born in the United States on August 22, 1868, which would have paid \$15,000 per annum to him for his life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, for the sum of \$153,750.

An annuity upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$15,000 per annum to her for her life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, for the sum of \$196,537.50. An annuity upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$20,000 per annum to her for her life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929,

for the sum of \$262,050. An annuity upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$25,000 per annum to her for her life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, for the sum of \$327,562.50.

OPINION.

Hill: The substantial question which we are called on to decide here is the nature of the contract entered into between petitioner and F. A. Gillespie and the company on May 15, 1929. The petitioner argues initially (1) that it constituted a sale of the properties transferred, with payment to be made in annual installments, and the annual payments, therefore, constituting a return of capital, may not be taxed as income. (2) It is contended in the alternative that if the amounts agreed under the contract to be paid to petitioner are considered annuities, their taxation under section 22 (b) (2) of the Revenue Act of 1934,¹ is unconstitutional, since the stat-

¹Sec. 22. Gross Income.

* * * * * *

(b) Exclusions From Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * * *

(2) Annuities, Etc.—Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a

ute, in making an arbitrary division between return of capital and income, taxes the former as income. This result, it is contended, is beyond the limits of the power conferred by the Sixteenth Amendment.

(3) Petitioner argues further that, if the amounts in question are held taxable as annuities, the cost basis to be used in applying section 22 (b) (2), *supra*, must be only the cost from a reputable insurance company of the annuity payable to the petitioner. It is agreed by both parties that the petitioner was the owner of one-half the properties

life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this title or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premium and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) or this paragraph.

transferred, the value of which was in excess of the fair cost of annuity agreed to be paid to petitioner. This excess, it is contended, did not constitute consideration for the annuity but was a gift to the petitioner's children through the agency of the company and thus may not be included in the base on which the 3 percent taxable return is to be computed. (4) Finally, it is argued that \$2,666.25 of the amount in question may not be taxed as income in any event, for the wholly separate reason that it represented the proceeds of a loan.

(1) We may dispose of the first argument of the petitioner without extended consideration. The contract of May 15, 1929, may not, in our view, be interpreted as an ordinary sale or exchange of capital assets with payment to petitioner extended over several years. The distinguishing peculiarity of an annuity—that its continuance is dependent entirely on the life of the recipient of the payments—is here present. By statute, amounts received under contracts of this nature are made taxable to a limited degree and the direction of the statute may not be ignored. It can make no difference, in our opinion, that the consideration for the annuity was the transfer of property rather than money, and in this view we are sustained by *Florence L. Klein*, 6 B. T. A. 617, and *Guaranty Trust Co. of New York*, Executor, 15 B. T. A. 20.

(2) Adverting to petitioner's argument that the application of section 22 (b) (2) to the facts presented is unconstitutional, we deem this contention

without substantial basis. The scheme devised by Congress for taxing amounts received as annuities may not, in the light of its legislative history, be considered arbitrary, see Title Guarantee & Trust Co., Executor, 40 B. T. A. 475, 480-482, or a tax on capital, see F. A. Gillespie, 38 B. T. A. 673. It is rather a method reasonably arrived at, which in the great majority of cases will result fairly for both the taxpayer and the tax gatherer. In a situation where the division between income and a return of capital is difficult, if not impossible, some latitude must be allowed to the lawmaker and the possibilities for an arbitrary result in isolated cases must be appraised against the necessity for taxing the transaction in question both as a means to revenue and as a means to discourage or prevent tax avoidance. In the light of the circumstances requiring the enactment of the statute in question, which are set out more at length in the cases cited above and in Anna L. Raymond, 40 B. T. A. 244, we can not say that it is unconstitutional as sought to be applied here by the Commissioner. Accordingly, petitioner must fail in this contention.

(3) The alternative argument of the petitioner presents essentially a question of fact: Whether the consideration for the annuity agreed [149] to be paid to her under the contract of May 15, 1929, was the entire property transferred by her under that agreement, or only that portion of the property required to purchase those annuities from a reputable insurance company.

This identical question as it related to the tax liability of F. A. Gillespie, cotransferor with petitioner under the agreement of May 15, 1929, was before us in *F. A. Gillespie, supra*, and we held there that the entire properties transferred were consideration for the annuities, in view of the provisions of the contract and in the absence of other evidence explaining the purpose of the transferors in conveying properties in excess of the fair cost of such annuities. In the present case that excess has been explained and the deficiency in evidence supplied. In her deposition petitioner has testified that her purpose in making transfer of the excess properties was to benefit her children or grandchildren and to safeguard their future income. This she thought best to accomplish by transferring all but a small portion of her properties to the company, instigating thereby a similar transfer by her husband. Since the children were then the beneficial owners of the larger part of the company and were, by virtue of the 1921 trust agreement, to become the sole owners of the company, along with the grandchildren, this transfer secured to them the properties then owned by their parents. The last possibility of the diversion of any of it away from them was precluded by the provision of the contract of May 15, 1929, that F. A. Gillespie might not sell any of the stock of the company held by him as trustee without the consent of the directors of the company. Petitioner testified in this proceeding, in effect, that she gave her properties to the company to safeguard her children

and grandchildren, subject to the provision that certain sums be paid to her annually during her lifetime, and that she considered the remainder of the value of the property over the cost of such annuity to be a gift or contribution for the benefit of her children and grandchildren. This evidence, fitted with the circumstances of the instant case, compels the finding that the properties transferred to the company by petitioner in excess of the fair cost of the annuity secured to her thereby did not constitute consideration for that annuity. In the present circumstances it becomes unnecessary to go further and decide whether the excess amount was paid to the company as a gift, as in *Anna L. Raymond*, *supra*, or as a contribution to capital, see *Robert H. Scanlon*, 42 B. T. A. 997. In either event may this excess amount be included in the cost basis of the annuity required for computation of the tax due under section 22 (b) (2).

Respondent objects to the consideration of the evidence noted on two grounds: It is argued, first, that the "issue that a part of the [150] property transferred to the corporation was a gift" was not properly raised in the pleadings or at the hearing. This "issue" we regard as properly presented under petitioner's contention that only the fair cost of the annuities acquired may be used in computing the 3 percent limitation placed on the tax by section 22 (b) (2). It forms an integral part of that argument and need not be pleaded as a separate issue. In the second place, respondent has moved to strike peti-

tioner's entire testimony on this point on the ground that it is immaterial and that it conflicts with the parol evidence and best evidence rules. At the hearing ruling on this motion was reserved for disposition in this opinion. The materiality of the testimony to the issues presented we deem apparent. The parol evidence rule applies only as between the parties to the agreement and can not, therefore, apply in the instant case. See *Bertelson & Peterson Engineering Co. v. United States*, 60 Fed. (2d) 745; *Indianapolis Glove Co. v. United States*, 96 Fed. (2d) 816. Moreover neither rule may apply where there is ambiguity in the written language; here the terms of the two agreements entered into on May 15, 1929, conflict. In one the payment of annuities is described as "consideration" and in the other as "part consideration" for the transfer of the properties. The resultant confusion of meaning may properly be dispelled in this instance by the testimony of petitioner. See *Bertelson & Peterson Engineering Co. v. United States*, *supra*, at page 747. Cf. *A. L. Wilson Co.*, 24 B. T. A. 1056. This conflict of terms was noted in *F. A. Gillespie*, *supra*, at page 677, but in the absence of any explanatory evidence the presumption favoring the Commissioner compelled the result reached there. Respondent's objections and motion are accordingly overruled.

(4) The final point of controversy on which we must rule here is the petitioner's claim that \$2,-666.25 of the amount received from the company was intended as a loan to be used to discharge a

portion of the mortgage on petitioner's property, together with accrued interest. The evidence shows, however, that no note was executed as evidence of that loan, that no interest was agreed on or paid, and that no repayment of principal has been made. Neither was the loan reflected in the balance sheet of the company as an asset. In these circumstances, we think the petitioner has failed to make adequate proof that such an amount constituted a loan. The impression that it was paid as a part of the amount due under the agreement of 1929 is gained and strengthened by the fact that the company was a closely held corporation and that petitioner had shortly before the taxable year relinquished the right to receive a portion of her annuity in return for the payment of an installment on the mortgage in question [151] from another source. Accordingly, we hold that no part of the \$17,666.25 received by petitioner during the taxable year was a loan and that the entire amount was paid as an annuity under the contract of May 15, 1929.

There remains the determination of the amount of income taxable to petitioner. This is to be computed on the basis of 3 percent of the cost of an annuity of \$25,000 purchased by petitioner on May 15, 1929, from a reputable insurance company. The \$25,000 figure must be taken in preference to the \$15,000 sum contended for by petitioner, since the former amount was that for which the properties were transferred. Subsequent relinquishment of a portion of the annuity can not alter the determina-

tion of the amount which was transferred under the 1929 contract as consideration for the annuities receivable by petitioner. No argument is made, it should be noted, that the \$10,000 guarantee of the dividends to be received annually by petitioner did not in itself constitute an annuity. Both parties seem to concede that it falls in a class with the \$15,000 annuity and we have so treated it.

Since the parties have stipulated that the cost of such an annuity is \$327,562.50, petitioner's taxable income in 1935 is held to be 3 percent of that amount, or \$9,826.88.

Decision will be entered under Rule 50.

[Title of Board and Cause.]

MOTION FOR RECONSIDERATION

Comes now the petitioner in the above entitled cause by her counsel, Harold E. Rorschach, and moves this Honorable Board for an order granting:

A reconsideration of the case upon the basis of the record already made upon issue 4 (c) of the amended petition, for the reason that:

Member Hill prepared an opinion which was promulgated as the opinion of the United States Board of Tax Appeals on January 22, 1941, in the above entitled case. In said opinion the Honorable Board found that tax should be computed on the basis of 3% of the cost, as of May 15, 1929, of an annuity which would produce \$25,000 per year for petitioner.

It is submitted that the Board erred, in that a material fact has been misconstrued in the foregoing opinion; it is [153] now submitted that the Honorable Board should find that the tax should be computed on the basis of 3% of the cost, as of May 15, 1929 of an annuity which would produce \$15,000 per year for petitioner.

In support hereof, the petitioner submits the attached memorandum brief and requests that this motion be decided upon said brief, after an opportunity has been given the respondent to submit a counter brief.

All of which is

Respectfully submitted,
(Signed) HAROLD E. RORSCHACH
1046 Kennedy Building,
Tulsa, Oklahoma
Counsel for Petitioner

Denied Feb. 19, 1941.

SAM B. HILL
Member U. S. Board of Tax
Appeals

[Endorsed]: U.S.B.T.A. Filed Feb. 19, 1941.

[154]

United States Board of Tax Appeals

Docket No. 98770

MAUD GILLESPIE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its report promulgated January 22, 1941, it is

Ordered and Decided: That there is a deficiency in income tax due from petitioner for the calendar year 1935 in the amount of \$549.76.

[Seal] (S) SAM B. HILL
Member.

Enter:

Entered March 20, 1941. [155]

[Title of Board and Cause.]

PETITION FOR REVIEW BY THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

I.

Maud Gillespie, your petitioner, respectfully petitions this Honorable Court to review the decision of the United States Board of Tax Appeals entered on March 20, 1941, in finding a deficiency in income tax due from your petitioner for the calendar year 1935 in the amount of \$549.76. Your petitioner, at the time of filing this petition is a citizen of the United States and resides at Beverly Hills, California.

The return of income tax in respect of which the aforesaid tax liability arose was filed by your petitioner with the Collector of Internal Revenue for the Sixth Collection District of California, located in the City of Los Angeles, State of California, which is located within the jurisdiction of the Circuit Court of Appeals for the Ninth Judicial Circuit. [156]

Jurisdiction in this court to review a decision of the United States Board of Tax Appeals aforesaid is founded on Sections 1001-3 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, Section 1101 of the Revenue Act

of 1932, and Section 519 of the Revenue Act of 1934. (Sections 1141-1142, Internal Revenue Code).

II.

Nature of Controversy

Petitioner regularly filed her tax return for the calendar year 1935 with the Collector of Internal Revenue at Los Angeles, California, said return disclosing a loss of \$209.29. Thereafter, by registered letter dated March 2, 1939, the Commissioner of Internal Revenue adjusted the net income disclosed by the return, by an amount alleged to be annuities received in the sum of \$17,666.25, it being alleged that the addition to income was in accordance with the decision rendered by the United States Board of Tax Appeals in the case of F. A. Gillespie for the year 1934 (38 B.T.A. 673).

Your petitioner duly filed her petition, and thereafter by motion granted, filed her amended petition, and thereafter, during trial, amendment to amended petition was allowed by the Board and upon answers denying the material portions of the amended petition and amendment to amended petition, the cause was tried to the United States Board of Tax Appeals, Member Hill presiding. [157]

The issues in the case joined by the pleadings are as follows:

(a) Section 22 (a) (2) of the Revenue Act of 1934, in the manner sought to be applied to the taxpayer by the Commissioner of Internal Revenue, is unconstitutional and void and not within the pur-

view of the Sixteenth Amendment to the Constitution of the United States and is the taking of taxpayer's property without compensation.

(b) The payment made to Maud Gillespie in 1935 was pursuant to an agreement for the purchase of property having a cash cost in excess of \$1,000,000, the cost of which had not been returned to Maud Gillespie prior to the year 1935, nor during the year 1935.

(c) In the alternative, if it is determined that any part of the sum of \$17,666.25 received by Maud Gillespie during the year 1935 was taxable, then only such portion of the sum of \$17,666.25 is taxable as represents 3% of what an annuity would have cost at May 15, 1929 as would have produced the sum of \$15,000 per annum during the lifetime of Maud Gillespie.

The Board of Tax Appeals held:

(a) That the contract of May 15, 1929 was not an ordinary sale or exchange of capital assets, with payment to the petitioner extending over several years.

(b) Denied the petitioner's contention that the appli- [158] cation of Section 22 (b) (2) to the facts presented, is unconstitutional;

(c) That the petitioner agreed to transfer certain property to F. A. Gillespie and Sons Company, and as part consideration, the company agreed to pay petitioner two annuities, totalling \$25,000 annually, and held that the cost basis of the annuities to be used in computing the tax is the cost of

these annuities based upon the consideration for which a reputable life insurance company would have written an annuity for like amounts.

(d) Denied that the sum of \$2,666.25 was intended as a loan.

III.

ASSIGNMENT OF ERRORS

In making its decision as aforesaid, the United States Board of Tax Appeals committed the following errors, upon which your petitioner relies as a basis of this proceeding:

(a) The Board erred in finding that the contract of May 15, 1929 was not an ordinary contract of sale, or contract for the exchange of capital assets, the payment to petitioner extending over a period of years.

(b) The Board erred in not holding that the application of Section 22 (b) (2) to the facts presented was unconstitutional and void.

(c) The Board erred in not finding that the \$10,000 annuity was donated back to the company by Maud Gillespie under date of November 16, 1933.

[159]

(d) The decision and final order is not sustained by substantial evidence and is contrary to law.

(e) Error of law occurring at the trial, excepted to by the petitioner.

(f) The decision and final order is contrary to the evidence.

(g) The Board erred in its findings of fact and in its opinion, as promulgated on January 22, 1941, in that the same are contrary to law and contrary to the evidence.

Wherefore, your petitioner prays that this Honorable Court may review the decision and order of the United States Board of Tax Appeals and reverse and set aside the same and direct the said Board to hold that there is no deficiency, and for the entry of such further orders and directions as shall by the court be deemed meet and proper in accordance with the law.

(Signed) HAROLD E. RORSCHACH

1046 Kennedy Bldg.

Tulsa, Oklahoma.

Counsel for Petitioner [160]

State of Oklahoma

County of Tulsa—ss.

Harold E. Rorschach, being duly sworn upon oath, deposes and says:

I am the attorney for the petitioner in this proceeding; I have prepared the foregoing petition and I am familiar with the contents and allegations of fact contained therein, and the same are true, to the best of my knowledge, information and belief.

This petition is not filed for the purpose of delay and I believe the petitioner is fully entitled to the relief sought.

(Signed) HAROLD E. RORSCHACH

Subscribed and sworn to before me this 18th day of June, 1941.

[Seal]

LENA ALLEN

Notary Public

My commission expires March 30, 1944.

[Endorsed] U.S.B.T.A. Filed June 19, 1941. [161]

[Title of Board and Cause.]

To: Commissioner of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

J. P. Wenchel, Chief Counsel,
Bureau of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

You are hereby notified that on the 19th day of June, 1941, a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals heretofore rendered in the above-entitled cause, was filed with the Clerk of the Board. A copy of the petition as filed is attached hereto and served upon you.

Dated June 19, 1941.

HAROLD E. RORSCHACH,
1046 Kennedy Building, Tulsa, Oklahoma.
Counsel for Petitioner.

Service of the foregoing notice of filing and of a copy of the petition for review is hereby acknowledged this 19th day of June, 1941.

J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: U. S. B. T. A. Filed June 19, 1941.

[162]

[Title of Board and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes now Maud Gillespie, petitioner and appellant herein, by her counsel Harold E. Rorschach and hereby designates for inclusion in the record upon appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, the complete record in this cause, including all petitions, amendments thereto, answers and all other pleadings and motions, together with all the proceedings had herein, including the docket entries of the Clerk of the United States Board of Tax Appeals and all of the evidence, including oral testimony and exhibits introduced herein, and depositions and exhibits to depositions introduced herein, and herewith files two copies of the official court reporter's transcript of all the evidence, proceedings and rulings of the Member of the Board during the trial, together with two copies of all exhibits therein,

as prepared and certified to by the [163] said official court reporter, to be included in said record, and all orders, decisions, stipulations, findings of fact, judgments, decrees and decision or decisions of the United States Board of Tax Appeals.

(Signed) HAROLD E. RORSCHACH,
1046 Kennedy Building, Tulsa, Oklahoma, Counsel
for Petitioner.

The undersigned hereby acknowledges service of a copy of the foregoing "Designation of Contents of Record on Appeal", this 14th day of July, 1941.

J. P. WENCHEL,
Counsel for Respondent, Commissioner of Internal Revenue.

[Endorsed]: U. S. B. T. A. Filed July 14, 1941.
[164]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 164, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of

Tax Appeals, at Washington, in the District of Columbia, this 24th day of July, 1941.

(Seal) B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.
[165]

[Endorsed]: No. 9883. United States Circuit Court of Appeals for the Ninth Circuit. Maud Gillespie, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed August 4, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9883

MAUD GILLESPIE,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT RELIES ON APPEAL

Pursuant to Rule 19 of this Honorable Court, the appellant now files a statement of the points upon which she relies upon appeal herein and says that she relies upon each and every point set out below. Said points are as follows:

I.

The Board erred in finding that the contract of May 15, 1929 was not an ordinary contract of sale, or contract for the exchange of capital assets, payment to petitioner extending over a period of years.

II.

The Board erred in not holding that the application of Section 22 (b) (2) of the Revenue Act of 1934, to the facts presented was unconstitutional and void.

III.

The Board erred in not finding that the \$10,000 annual payment was donated back to F. A. Gillespie and Sons Company by Maud Gillespie under date of November 16, 1933.

IV.

The decision and final order is not sustained by substantial evidence and is contrary to law.

V.

Error of law occurring at the trial, and excepted to by the petitioner.

VI.

The decision and final order is contrary to the evidence.

VII.

The Board erred in its findings of fact and in its opinion, as promulgated on January 22, 1941, in that the same are contrary to law and contrary to the evidence.

HAROLD E. RORSCHACH,
1046 Kennedy Bldg., Tulsa, Oklahoma, Counsel for
Appellant.

Service of copy of the foregoing statement of points is hereby acknowledged on behalf of the appellee this 18th day of August, 1941.

J. P. WENCHEL,

Counsel for Commissioner of Internal Revenue.

[Endorsed]: Filed Aug. 23, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

MOTION BY APPELLANT, DESIGNATING
RECORD TO BE PRINTED

Comes now the appellant, Maud Gillespie, by her counsel, Harold E. Rorschach and designates for printing the entire transcript of the record received from the Clerk of the United States Board of Tax Appeals and certified under his hand and seal.

HAROLD E. RORSCHACH,
1046 Kennedy Building, Tulsa, Oklahoma, Counsel
for Appellant.

Service of copy of the foregoing designation of record to be printed is hereby acknowledged this 18th day of August, 1941.

J. P. WENCHEL,
Counsel for Commissioner of Internal Revenue.

[Endorsed]: Filed Aug. 23, 1941. Paul P.
O'Brien, Clerk.